TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 111.

THE UNITED STATES *EX REL.* EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, PLAINTIFF IN ERROR,

vs.

GEORGE BRUCE CORTELYOU, SECRETARY OF THE UNITED STATES TREASURY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 21, 1907.

(20,768.)

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In the Court of Appeals of the District of Columbia.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix, &c., Appellant,
vs.
GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

a Supreme Court of the District of Columbia.

At Law. No. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
v.
LESLIE M. SHAW, Secretary of the United States Treasury.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed May 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
v.
LESLIE M. SHAW, Secretary of the United States Treasury.

The relator, Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, says:

1. That she is a citizen of the United States and a resident of the District of Columbia; that the defendant is a citizen of the United States and at present a resident of said District. That on the 7th day of April, A. D. 1905, by virtue of the decree of the Supreme

Court of the District of Columbia, sitting as a Probate Court, she duly qualified as Executrix of the last will and testament of her father, Joseph W. Parish, deceased. The certificate of the Register of Wills of this District, showing her said appointment and qualification, marked "Relator's Exhibit No. 1," is filed herewith and made part of this petition.

2. That under and by virtue of an act of Congress approved May 31, 1872, the said J. W. Parish brought an action in the Court of Claims to enforce the rights accruing to him under a con-
2 tract made with the United States authorities on March 5, 1863, by said Parish, as J. W. Parish & Co. By said Contract the said Parish agreed to deliver at Memphis, Nashville, St. Louis, and Cairo, for the use of the United States Medical Department, the whole amount of ice required to be consumed during the remainder of the year 1863. The ice was to be in quality, "A. No. 1;" was to be subject to inspection; rates of payment for ice delivered at Nashville per ton, $25.00; at Cairo and Memphis, $20.00; at St. Louis, $15.00; three working days were allowed for discharging each cargo at either of the points mentioned. A copy of said original agreement, marked "Relator's Exhibit No. 2," is filed herewith, as part of this petition. On March 25, 1863, Joseph B. Brown, by instruction of Assistant Surgeon-General Wood, issued the following order:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
SAINT LOUIS, MISSOURI, *March* 25, 1863.

Messrs. J. W. Parish & Co.

GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct *that the ice which you have agreed to deliver* at the points designated in your contract *shall be distributed* in the following quantities, viz:

At St. Louis	5,000 tons
At Cairo	5,000 tons
At Memphis	10,000 tons
At Nashville	10,000 tons

making *the total of 30,000 which you have contracted to deliver.* The ice to be delivered at Nashville and Memphis is for use of the sick of the armies in the field and should be furnished without delay.

Very respectfully, your ob't servant,
By order of the Assistant Surgeon-General,
JOSEPH B. BROWN,
Surgeon, United States Army.

3 The said Parish immediately made his arrangements to execute the foregoing order "without delay."

3. Mr. Horace S. Cummings, an officer of the Executive Department to which Parish originally applied for redress, in a statement filed with the testimony taken in the Court of Claims, says: "From a personal inquiry, made at the Surgeon-General's office of Mr. Ram-

say, Chief Clerk, who was at the time conversant with the transaction, I learn that the meltage of Mr. Parish's ice was very small as compared with other dealers or contractors, as it generally averages 1/3 to 1/4, while Mr. Parish's average only between 1/7 and 1/8, of the amount delivered. It also appears that the price received per ton by Mr. Parish for ice in the Mississippi Valley was about $20, while the records of the Surgeon-General's office show that during the same period the Medical Department were obliged frequently to buy of private parties in the same section of the country and they paid on the average more than $60 per ton."

4. It therefore appears that said Parish was effectually performing his part of said contract with the Medical Department, when, on March 31, 1863, was sent the following:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
ST. LOUIS, MISSOURI, *March* 31, 1863.

To J. W. Parish & Co. (care of C. H. Wicker & Co.), Chicago, Ill.:

I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

4 R. C. WOOD,
Assistant Surgeon-General."

5. In the trial in the Court of Claims, that Court finds in the 5th finding of fact: "It does not appear that this dispatch (viz of March 31, 1863) ever reached the claimant- or either of them. The claimant Parish did have knowledge of this notice by oral information from the Assistant Surgeon-General at St. Louis, on the 2nd day of April following."

The 6th finding of the Court of Claims is as follows: "Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and, after delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2nd day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammond, of March 31, he had purchased, or contracted for the purchase of 23,000 tons of ice."

The 7th finding is: "The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At St. Louis	4,174
At Cairo	1,388
At Memphis	6,456
At Nashville	750
Total	12,768

For this quantity the said Parish has been paid the contract prices."

5 Finding VIII. "Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2nd of April,

1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; but the said Parish did not have steamboats and barges at said lake in that month to transport the ice which he purchased there; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish."

Finding IX. "The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

Finding XI. "The notice of 25th of March, 1863, to the claimants, from the Assistant Surgeon-General's office at St. Louis set out in finding V, and which was suspended by order of the Surgeon-General, remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863."

6. And now this relator says, that the majority of the Court
6 of Claims, speaking through Drake C. J., held: "In our judgment, the letter of Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government, and, as the claimant's case rests upon that, their petition must be dismissed." (12 Court of Claims p. 620.)

In a dissenting opinion of Nott J. (Peck J. concurring), which was afterwards in substance sustained by the U. S. Supreme Court, it is stated: "In the army when a superior officer amends, modifies, or changes the order of his inferior it immediately becomes his order. If the Assistant Surgeon-General had no authority *to order the claimant to deliver this ice "without delay," as he did*, the Surgeon-General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so as to keep it in suspense and at the same time declare that it never had vitality. To suspend it was to give it vitality if it had none, and to that extent to ratify it. * * * The fact that this contracor's commodiy was of the most perishable nature was a fact known to him when he agreed to deliver the amount of ice required to be consumed.

* * * That this ice proved a total loss to the contractor and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial. A large quantity of ice is not a commodity that can be handled and thrown upon the market in warm weather, nor sent forward and stored to await demand. * * * The order to deliver caused him to purchase it; the suspension of the order occasioned its loss." (*Id.* pp. 622, 623, 624.)

7. The case went up to the Supreme Court of the United
7 States, and that tribunal, in an opinion from which there was no dissent, concurred with the dissenting opinion in the

Court of Claims. Miller J., speaking for the Court, said: "We apprehend, if the case were reversed and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General. * * * The order of the 25th of March, made within twenty days after the contract was signed was an unequivocal demand, *under that instrument*, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. No one familiar with the climate and the sources of supply could doubt *that to enable him to fulfill this demand made at that season, required promptitude and diligence in securing the ice.* * * * They were, therefore, under an imperative necessity to prepare to fulfill this requirement."

8. The Supreme Court did indeed adjudge, that "to hold the Government to the contract price for all those amounts, they (Parish & Co.) should have delivered, or tendered, or offered to deliver, and demanded payment." But they also said: "as the Government left the demand suspended so that while claimants were compelled to purchase under the original orders, and *could not safely dispose of it while it remained unrevoked*, they are entitled to recover what they paid for the ice which was lost, and what expense they were at in making the purchase and in keeping it until it was lost." The Court therefore held, that "Claimants are entitled to the expenses
8 and losses incident to the preparation to meet the demand of the notice served on them. The cost of the ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 7,232 tons of ice purchased to enable them to meet that requirement, must form the measure of the plaintiff's recovery. Because these are not found by the Court of Claims, the judgment of court will be reversed, and the case remanded, that their damages may be ascertained and judgment entered accordingly." (Parish *v.* U. S., 100 U. S. 504-6.)

As will be seen from the report of the case, the opinion of Drake C. J., that said Parish was not justified in treating the order of the Assistant Surgeon-General as valid, was so untenable that it was abandoned, for as to this it is stated by Miller J.: "In the argument of the case before us the counsel for the Government abandons this view of the matter and we think properly."

9. Your relator says that whatever may have been the showing of the record in the U. S. Supreme Court the record in the Court of Claims left no doubt as to the total loss of 17,232 tons of ice. It showed the purchase by Parish of 10,000 tons at Lake Pepin from Wicker, and 6,000 more at Lake Pepin from Beasly. The 6,000 tons yielded to the same natural causes which put an end to the 10,000. The loss of the remaining 1,232 tons is accounted for by the testimony of Hennel Stevens, Medical Purveyor at Cairo from October 24, 1862, to the latter part of May, 1863, and from that time until August, 1865, at Memphis. It is unnecessary to recite the

evidence on this subject, since the fact of such total loss was
9 ascertained by a reference to the War Department, and in effect adjudicated by legislative act, to be hereinafter more particularly mentioned.

10. The Court of Claims, in response to the mandate of the U. S. Supreme Court held, that it could not, under, its rules, reopen the case for additional evidence, but on that before it made an award in favor of the claimant in the sum of $10,444.91. (16 Court of Claims 642.) The claimant then asked at the hands of Congress the means of satisfying so much of this claim, as the Court of Last Recort had adjudicated to be his unquestionable right. His claim was referred by the House Committee to the War Department, for report. The Surgeon-General found that the whole amount of undelivered ice, viz., 17,232 tons was lost to said Parish, and ascertained the cost thereof.

11. This relator therefore shows, that for 12,768 tons of ice furnished to the Government the petitioner had been paid the contract price. There had been left on his hands undelivered 17,232 tons of ice. The War Department reported back to Congress that, under the evidence taken before the Court of Claims and the additional evidence before it, Parish was entitled to be reimbursed on account of the ice not delivered, the sum of $58,341.85, in addition to the award of the Court of Claims, $10,444.91, to compensate him for the amount he had lost because of the non delivery of the 17,232 tons of ice. On the coming in of this report, by act of Congress of February 20, 1886, it was enacted: "That the Secretary of the Treasury be and he is hereby directed to pay to Joseph W.
10 Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterward called for, or taken by the Government, but were wholly lost to said Parish." (24 Stat. 653-4.) There can be no gainsaying that this act is a legislative declaration, as conclusive as the judgment of a Court, fixing the fact of the purchase by said Parish, for the use and at the request of the Government, of 17,232 tons which were not afterwards called for, but were "wholly lost," and further determining what was honestly due him on this account, and ordering the same to be paid.

12. This relator further shows, that when the payment last mentioned was made the said Parish had received the contract price on the ice actually delivered, viz 12,768 tons; and in addition what he had actually spent and actually lost on account of the balance, viz. 17,232 tons of ice. That which was paid to him, after February 20, 1886, was only that which the U. S. Supreme Court adjudicated should have been paid to him on January 1, 1864. That is to say, the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating his claim, and been subjected to the labors, anxieties, and trials of prosecuting the same.

13. So much had been placed beyond the field of discussion, when

evidently under the conviction that full justice had not been done, on the 17th of February, 1903, Congress passed a further act
11 as follows: "That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish & Co. with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which act bears date March 5, 1863, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army, the whole amount of ice to be consumed at Memphis and Nashville, Tennessee; St. Louis, Missouri, and Cairo, Illinois; during the remainder of said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company, *if the said contract had been carried out in full* without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States *v.* Behan, 110 U. S. 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and *after determining the full amount thus due said J. W. Parish & Co. under said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Co. or to said J. W. Parish, whether in pursuance of judgments of the Court or direct appropriation by Congress or otherwise, stating what balance if any, is due under the rule and evidence presented herein and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby ap-*
12 *propriated out of any money in the Treasury which has not been otherwise appropriated.*" (32 Stat. 1612.)

14 Your relator submits, that the foregoing act is a plain, unambiguous direction to the Secretary of the Treasury to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper Government accountant. If a reasonable doubt could exist as to the plain meaning of the act the able and learned reports of the Committees of the Senate and the House should efface it completely. The Senate Report states: "It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it then the Court admits that his measure of damages would have been the contract price of the ice or the profits he might have made if he had done so * * * In the case of United States *v.* Behan (110 U. S. 338), which was decided four years later than the Parish case and which is now the rule, the Court laid down the rule as follows: "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance less the

value of material on hand; Secondly, the profits that he would realize by performing the whole contract. The second item profits cannot always be recovered. They may be too remote and speculative in their character and, therefore, incapable of that clear and
13 direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *v.* Mayor of Brooklyn, they are "the direct and immediate fruits of the contract," they are free from this objection, they are then "part and parcel" of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they cannot be legally proved the party is confined to his loss of actual outlay and expenses." (Also See U. S. *v.* Speed *et al.* 8 Wall. 77.) In the Masterson *v.* Brooklyn case cited by the Supreme Court in the above quotation, the plaintiff contracted with the Corporation of Brooklyn to furnish all the Marble necessary for the erection of a certain public building, after part performance defendants refused to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which the defendants agreed to pay. The reasons for the application of this more equitable rule in the Behan case were not nearly so strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice at the various places named. The profits, therefore, were readily and easily ascertainable. In fact that was the theory of the plaintiff in making his case before the Court of Claims and the record of that Court shows that the proofs on that point were explicit, bringing the case
14 within the principles laid down in Behan *v.* U. S. In a word, it is perfectly clear that the Supreme Court overlooked one of the most important findings of fact in the Parish case * * * Congress having therefore given only partial justice in *this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law* contemplates." The House Committee adopts this report and adds to it citation after citation confirmatory of Masterson *v.* Mayor 7 Hill 61; among others, authority to show "that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would be made that the tender would not be accepted, or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused" * * * The error of the Supreme Court was due, we think, to overlooking the 9th finding of fact of the Court of Claims in Mr. Parish's case. In fact we cannot reconcile the decision of the Supreme Court with any other opinion * * * Your Committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in Masterson & Smith *v.* The Mayor of Brooklyn (7 Hill 61, 69) followed and approved in the Behan case, *supra*, is the true

measure of damages clearly applicable to claimant's case." This relator is advised that where the time for delivery is to be fixed by the buyer, the seller cannot be put in default until notified of the time when to deliver. A copy of said Act of February 17, 1903, together with the reports of the Committees of the Senate and the House, marked "Relator's Exhibit No. 3," is filed herewith and made part of this petition.

15 15. Your relator further says that whether or not the Committees of the two Houses of Congress were right in their confident assumption that the 9th finding of the Court of Claims was not brought to the attention of the U. S. Supreme Court, it is certain that the findings of the Court of Claims did not specify evidence in the record tending to show, and indeed conclusively establishing that every requirement of the rule as to tender had been complied with. In the deposition of Robert T. Cramer, Acting Medical Purveyor and Disbursing Officer in the Medical Department of the Armory at St. Louis, Missouri, between the 25th of March, 1863, and the 2nd day of April, 1863, the deponent states: "I remember a contract for furnishing ice to the Medical Department of the Armory, I think 30,000 tons. * * * The Contractor was J. W. Parish & Co. * * * I think the contract had been made in Washington, but the apportionment had been made, I think, at St. Louis. * * * It was on the 25th of March that I first saw him (Parish) and on that evening he left for Chicago." Q. "How soon after that did you see him again, as you now remember?" A. "It was during the early part of the next week. * * * He said he was prepared to furnish the ice." Cross Question—"You were not the proper officer to whom he should report his readiness to supply the 30,000 tons of ice, were you?" A. "I was the Chief Medical Disbursing Officer of the West; in addition to my having charge of the Medical Purveying Depot. I was the Medical Disbursing officer; I had possession of all the funds." Q. "Do you know whether Mr. Parish bought any ice after the first of April?" A. "I don't think he did, because he had told me, when he returned from Chicago, that he had

16 secured all the ice necessary to meet the contract." * * * Q. "Has your recollection as to some of the matters in this case been refreshed by any statements or suggestions of Mr. Parish in any of his letters?" A. "No, Sir. My memory has been refreshed by the correspondence I had with the Attorney-General, when I was requested to make replies to their communications; it was then that I hunted up everything that I had bearing upon the subject." Further direct question. "What quantity of ice did Mr. Parish state to you he was prepared to supply?" A. "He said, 'I have made all my contracts to furnish the 30,000,' and he wanted me, if I was in communication with my associates, to urge upon them the importance of securing it as soon as possible; that he was prepared to furnish the whole apportionment, 30,000 tons." (Rec. p. 193). The testimony of said witness is not contradicted nor impeached. It is, therefore, established. It sustains the 9th finding that said Parish was prepared and willing to deliver the whole 30,000 tons of ice in conformity with "the terms of said letter of March 25th, 1863, of which

the defendants had notice, but they would not, nor did, receive more than 12,768, tons aforesaid." Your relator once more says that the undisputed proof and said finding in accordance therewith demonstrates that full and ample tender was made by said Parish to the Medical Department, and notwithstanding such tender, as shown by the 11th finding, the suspending order of March 31, 1903, remained so suspended until the expiration of the time named for the duration of the contract. As is reiterated in the reports of the
17 two Committees, it was to give the said Parish, the full benefit of this that the act of February 17, 1903, was passed.

16. This relator further says, that, as stated in the Report of the Senate Committee, made a part of the Report of the House Committee, the profits legally due under the contract were readily and easily ascertainable; that the theory on which the plaintiff submitted his case in the Court of Claims, required just this proof, and that, "the record of that Court shows that the proofs on that point were explicit." The testimony of James L. Huse, shows the rate of transportation of ice during the Spring of 1863—by barges

From Lake Pepin to St. Louis.....	$5.00	per ton
" " " " Cairo	6.00	" "
" " " " Nashville	9.00	" "
From Cairo to Memphis.....	2.00	" "

As to rate by rail from Chicago to St. Louis, Cairo or Alton, the witness says: "From $5 to $6 would, I think, cover all the points." R. A. Scanlon, Government Superintendent of Transportation, from early in 1863 to the latter part of 1864, says, "the rate charged for the transportation of ice from Chicago to Cairo by rail, in the Spring and Summer of 1863, was $5 per ton." Isaac D. Harmon says they were the same to St. Louis. Peter Conrad says the rates from Lake Pepin to St. Louis were from $5 to $6 per ton; from Lake Pepin through to Memphis would make $2 per ton difference, and through to Nashville $2.50 to $3. Q. "Did you actually move ice between any two of the points named during the Spring of 1863?" A. "Yes, Sir." Q. "Between what two points did you move ice that season?" A. "From Lake Pepin to Memphis and from St.
18 Louis to Nashville." Louis A. Goodell deposed that ice could be brought from Lake to St. Louis in April and May, 1863, for about $5 per ton. * * * Q. "Will you swear that on the average of the season it could not be bought for less than $5, positively?" A. "Yes, Sir." The foregoing testimony received no word of contradiction from the defendant.

"The evidence collected by the Court of Claims" shows what would have been the price of transporting the non-delivered ice, with such certainty, that counsel for the Government in that Court, not only could not disprove but could not deny it, and in effect admitted what they were unable to dispute. This branch of the claimant's case was, therefore, conclusively established.

17. This relator further says that the Record in the Court of Claims shows the transportation of the ice from Lape Pepin and else-

where to have been perfectly practicable. Louis A. Goodell was asked, on cross examination, "Do steamers run on the Mississippi all Summer as far up as Lake Pepin?" A. "Yes, Sir, low water boats." Q. "Explain what you mean by that." A. "I mean a steam wheel boat that will draw about eighteen to twenty inches of water and can carry 100 or 150 tons and tow barges; I think they generally run the season through." The deponent had six barges at Lake Pepin. Q. "Did those all come down together?" A. "Yes, Sir." Q. "And would bring about how much?" A. "Well, the first trips I fetched down about 2,500 to 2,800 tons." * * * Q. "Can you state the latest trips that you came down the river?" A. "I think it was in July." James L. Huse states: "We were moving ice that year to all those points except Nashville and we trans-
19 ported ice to Nashville for several years succeeding that year." Q. "Did you during that season move any quantity of ice from Lake Pepin to either of the points you have named?" A. "We moved several thousand tons from Lake Pepin to St. Louis and points below." Q. 15. "Did you have any ice brought down from Lake Pepin by any other parties that season?" A. "We did a little that Summer." Isaac D. Harmon is asked: "State whether or not the claimants in his case had made preparations for transporting ice on the Mississippi river." A. "They had, so far as I was concerned. They had bought barges and employed tow boats. I remember about 2,000 tons on one barge they purchased." Joel H. Decker, being asked his opinion as to the ability and readiness of J. W. Parish & Co. to fulfill their contract, according to its terms, answered, "I know that they could have fulfilled it according to the terms of their contract. They were prepared and ready to fulfill it." A letter was proved and admitted in evidence, written at St. Louis, March 28, 1863, from Parish to C. A. Stevens & Co., in which the former stated: "I am getting boats and barges for Pepin Lake; I will have a fleet ready to start in ten days. Captain Davidson said he would take 3,000 tons from Lake Pepin to St. Louis for $5 per ton; I pay insurance he taking the usual risk. To get the ice bought of you out soon, I will give that amount and you can have him commence on your ice as soon as you can, as I would like to have it all aboard by the 10th."

18. This relator therefore says it is manifest that Congress did not seek to compel impossibilities in directing to be ascer-
20 tained, from the evidence in the case collected by the U. S. Court of Claims, the full amount due to said J. W. Parish. In point of fact, the statement of account so directed to be made was referred to the proper officer of the Government and of the Treasury, viz. to the Auditor for the War Department. Responding to the plain meaning of the act of February 17, 1903, the Auditor states the account as follows:

5,000 tons of ice at St. Louis, Mo.,	$5	per ton.....	$80,000
5,000 " " " " Cairo, Ill,	$20	" "	100,000
10,000 " " " " Memphis, Tenn,	$20	" "	200,000
10,000 " " " " Nashville, Tenn.,	$25	" "	250,000
			$630,000
From which deduct Payment by Medical Department.....		$129,783.33	
Settlements by 2nd Comptroller's office.....		171,072.69	
Award by Court of Claims.....		10,444.91	
Am't saved by non-delivered ice..... ...		137,385.12	
			448,641.05
Leaving balance due.....			$181,358.95

19. Your relator says that the foregoing account is so clear in itself, as to call for no aid of argument. Nevertheless, the same is fortified by the conclusions in writing of the Law Board of the office of the Auditor of the War Department, from which the following is extracted: "Said Committees, of Congress, were evidently satisfied with the evidence as to Mr. Parish's ability to have fulfilled
21 his contract and as to the loss of the ice. Congress itself was satisfied that Mr. Parish had made out a *prima facie* case, and was apparently entitled to the full amount of the profits prevented as well as of the losses sustained by the suspension of his contract, that is to an equivalent to the gains or profits he would have realized from the fulfillment of his contract: This statement is evidenced by the fact that Congress passed the act of February 17, 1903, directing the Secretary of the Treasury to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the said contract had been carried out in full, without change or default made by either of the parties thereto; in other words, as if Parish had delivered the whole amount of ice contracted for, and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice."

Further it is said: "If it should be deemed expedient or necessary to carry the investigation as to the claim under consideration farther than is required by the act of February 17, 1903, which authorizes and directs the Secretary of the Treasury to make full and complete examination into said claim, and to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the contract had been carried out in full, and if the evidence in the case collected by the Court of Claims should be examined to ascertain from that source, first, whether or not the contractor had purchased sufficient ice to meet his obligations under his contract; second, whether or not the ice left on his hands had,
22 in consequence of the refusal to receive it, been lost to him, it would be found that all these points are fairly well sustained in the affirmative by the testimony. It would appear, first, that the contractor purchased considerably more ice than the required 30,000 tons, apparently having regard to unavoidable melt-

age before delivery; second, that the Court of Claims was justified in making its 9th finding of fact to the effect that Mr. Parish was prepared and willing to deliver the 30,000 tons of ice contracted for in conformity with the conditions of the letter of March 25, 1863, and that he tendered the whole 30,000 tons, but that the Government would not and did not receive more than 12,678 tons; and third, that the 8th finding of fact as to meltage and loss of ice at Lake Pepin, together with the declaration contained in the act of Congress approved February 20, 1886, (24 Stat. L. 653) that all the ice not called for, "was wholly lost to said Parish" are based on sworn testimony. Therefore, in conclusion it is stated by said Law Board, "that under the act of February 17, 1903, there is not a single question of fact to be determined, other than the amount saved to the contractor by the non-delivered portion of the ice, the calculation of the value of the ice contracted for, at the contract prices, and the deduction therefrom of all payments already made to the contractor and claimant, and also of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice:" but further, "that the sufficiency of the evidence to prove the purchase of a single pound of the undelivered ice, between the 25th of March, 1863, and the 2nd day of April,
23 1863, by Joseph W. Parish & Co., or the loss of the same after the 31st day of March, 1863, is immaterial, in view of the provisions of the act of February 17, 1903." Hence it followed, "that after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition under the rule laid down for the measure of damages in the Behan case."

20. Your relator further shows that the said Auditor for the War Department sent to the said Joseph W. Parish, a letter bearing date August 11, 1903, as follows:

To Joseph W. Parish, care of Attorney J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due under act of Congress approved February 17, 1903, (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled as shown in the following statement and settlement certificate No. 23,729, transmitted to the Secretary of the Treasury for payment:

Amount claimed.	Amount disallowed.	Amount allowed.
		$181,358.95

A copy of this letter marked "Relator's Exhibit No. 4," is filed herewith as part of this petition.

21. And now this relator says that every condition precedent to payment to said J. W. Parish, in accordance with said act of February 17, 1903, had been satisfied by the examination and settlement made on August 11, 1903, by the Auditor for the War
24 Department; that thereby the exact sum due said claimant had been fixed; that the duty imposed by said act on the

Secretary of the Treasury was not an official duty, in the sense in which these words are accustomed to be used, but the performance of a particular duty imposed by special act, in order to secure justice to a private individual; that the examination and settlement of the account in question by the Auditor for the War Department, as the proper hand for the Secretary for this purpose, was the rendition of the justice and the performance of the duty contemplated by the act, and left nothing for judgment to determine, or for discretion to restrain or qualify; that what was not certain at the time of the enactment of February 17, 1903, was perceived to be capable of being rendered certain, and by said statement and account of August 11, 1903, had been rendered certain; that what would have been due said J. W. Parish, "if the said contract had been carried out in full, without change or default made by either of the parties thereto," was determined by the letter of the contract; that the determination of the "balance alleged to be due him by virtue of a contract made by J. W. Parish with Henry Johnson, a Medical Storekeeper, acting on behalf of the United States," called for the deduction from the amount due under said contract, of so much of the cost of transportation as had not been incurred and that, as stated by the Committee of both Houses: "The Record of the Court of Claims shows that the proofs on the point were explicit." The Auditor, therefore, proceeded upon proofs satisfactory to the Congress which passed the law and which that body directed should guide and govern the statement of account. From the result thus derived, the act directs to be subtracted "all payments which have been made to said Joseph Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court, or direct appropriation by Congress, or otherwise, stating the balance if any." There can be no doubt that this was honestly done by the Auditor, and the balance correctly stated. What was left to be done by the defendant was a purely ministerial act in obedience to and in execution of the clearly expressed will of the law making power, so that the said act of February 17, 1903, from and after the report or statement of account by said Auditor for the War Department became and was mandatory upon the defendant.

22. And now this relator shows, that, although every *prerquisite* had been fully complied with for the payment of such balance due said Parish, for which the said act of February 17, 1903, expressly appropriates sufficient money, "out of any money in the Treasury, not otherwise appropriated," nevertheless, the defendant, the said Leslie M. Shaw, Secretary of the Treasury, on the 31st day of May, 1904, declined and refused to pay said Joseph W. Parish the balance ascertained to be due by the Auditor for the War Department, or any balance or any sum whatever, and on the day aforesaid stated in express and positive terms that if said Parish was to be rewarded in any sum in excess of what had already been paid him, "Congress must fix the amount by specific appropriation." That is to say, the said Secretary positively refused to pay the balance found by the said Auditor to be due the said Parish or any part thereof.

26 Wherefore, since your relator has no remedy, save by this proceeding, she asks: That process may issue requiring the defendant, the said Secretary of the Treasury, to appear and answer this petition: That the writ of Mandamus may issue to said defendant requiring him to issue a draft in favor of this plaintiff for the sum of $181,358.95, so found due as aforesaid, by the Auditor for the War Department, and that a rule on said defendant may be granted, requiring him to show cause why such writ should not be granted, as aforesaid.

EMILY E. PARISH,
Executrix of Joseph W. Parish, Dec'd.

I do solemnly swear that I have read the petition by me subscribed, and know the contents thereof, and that the facts therein stated, upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

EMILY E. PARISH.

Subscribed and sworn to before me this First day of May 1906.
[SEAL.]
HENRY E. TRIPP,
Notary Public, D. C.

27 Form No. 50.

RELATOR'S EXHIBIT No. 1.

Filed May 2, 1906.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye, that the last will and testament of Joseph W. Parish, late, of the District of Columbia deceased, having been exhibited, proved and admitted to probate and record by said Court, and duly recorded in the office of the Register of Wills for the District of Columbia, the Clerk of said Court, Administration of all the money, goods, chattels, rights and credits of the said deceased was thereupon by said Court, on the 7th day of April, A. D. 1905, granted and committed unto Emily E. Parish who, as Executrix of the Will of said deceased, first executed a bond to the United States, with good and sufficient security, approved by the said Court, in the penalty of Five Hundred Dollars, conditioned for the faithful performance of her trust and took the oath prescribed and required by law; and whose appointment is unrevoked and still in force.

Witness the Honorable Harry M. Clabaugh, Chief Justice of said Court, this Seventh day of April, A. D. 1905.

Attest:
[SEAL.]
WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

Case No. 12677.

28 RELATOR'S EXHIBIT NO. 2.

Filed May 2, 1906.

"Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical store keeper, United States Army, and Acting Medical Purveyor, Washington, D. C. on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the City of St. Louis, State of Missouri, of the other part, witnesseth:

That the said Henry Johnson, medical store keeper, United States Army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz:—

"First. That said J. W. Parish & Co. shall deliver at Memphis, Tennessee; Nashville, Tennessee; St. Louis, Missouri; and Cairo, Illinois, the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

Second. That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars ($25).

Third. That for each and every ton of ice delivered at St. Louis, Missouri, and accepted by the medical officer in charge, the
29 said J. W. Parish & Co. shall receive the sum of sixteen dollars ($16).

Fourth. That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

Fifth. That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

Sixth. All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of the post where it is delivered, and such as does not conform to the specifications, set forth in this contract shall be rejected.

Seventh. That payments shall be made from time to time on receipted bills of lading and duplicate accounts certified to by the medical officer in charge of the post where it is delivered.

Eighth. No member of Congress shall be admitted to any share herein or any benefit to arise therefrom.

Ninth. It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to

be allowed by the said Henry Johnson, medical store keeper, United States Army, as per charter-party or bill of lading of the vessel.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.]

HENRY JOHNSON,
Med. Store Keeper, U. S. A.,
Acting Med. Purveyor.
J. W. PARISH & CO."

30 RELATOR'S EXHIBIT No. 3.

Filed May 2, 1906.

(Private—No. 469.)

An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of *of* a contract made by J. W. Parish and Company with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which contract bears date March fifth, eighteen hundred and sixty-three, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year eighteen hundred and sixty-three; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One
31 hundred and tenth United States Reports, three hundred and thirty-eight), and *with* accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated.

Approved, February 17, 1903.

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57TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 2104.

JOSEPH W. PARISH.

May 19, 1902.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Graff, from the Committee on Claims, submitted the following

REPORT.

[To accompany S. 475.]

The Committee on Claims, having considered Senate bill 475, recommend that the bill do pass without amendment. The facts are fully set forth in Senate Report No. 351, Fifty-seventh Congress, first session, as follows:

The Committee on Claims, to whom was referred the bill (S. 475) to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, having had the same under consideration, beg leave to make the following report and recommend the passage of the bill:

This claim has received several favorable reports in the House of Representatives, and was favorably reported to the Senate by the Committee on Claims during the Fifty-sixth Congress (Report No. 1628), which report fully sets forth the facts in the case, and is hereby adopted as the report of your committee.

The report referred to is as follows:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nashville, Tenn., St. Louis, Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the Assistant Surgeon-General in an order to the contractors, under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty days from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

The contractor at once commenced the purchase of ice, and within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pepin, in Minnesota—long distances from places of delivery.

After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said Assistant Surgeon-General that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the
33 contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the Assistant Surgeon-General had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the Assistant Surgeon-General, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. After the delays incident to the prosecution of a claim before the departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the Assistant Surgeon-General were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That there may

be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

"If claimants intend to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts, they should have delivered, or tendered, or offered to deliver, and demanded payment.

"If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

"In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept, and pay for part of it. The balance was never delivered or tendered.

"Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the United States *v.* Behan (110 U. S., 338), which was decided four years later than the Parish case, and which is now the rule, the court laid down the rule as follows:

"The *prima facie* measure of damages for the breach of con-
34 tract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct

items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of Masterton *v.* Brooklyn (7 Hill, 69), they are the direct and immediate fruits of the contract, they are free from this objection; they are then 'part and parcel' of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense." (Also see United States *v.* Speed *et al.*, 8 Wall., 77.)

In the Masterton *v.* Brooklyn case, cited by the Supreme Court in the above quotation, the plaintiffs contracted with the corporation of Brooklyn to furnish all the marble necessary for the erection of a certain public building. After part performance defendants refused to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay.

The reasons for the application of this more equitable rule in the Behan case were not nearly so clear and strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in Behan *v.* United States.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the Parish case. At all events, there is no doubt that the law is properly stated in the Behan case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported. In that report the committee state that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court of the United States *v.* Behan.

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of

your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid. If it does not owe him, that will also be brought to light, and in either event a final determination be reached.

Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates.

Asst. Q. M. Gen. Robert Allen, who had charge of the Department of the Mississippi Valley during the civil war, with headquarters at St. Louis, Mo., and Louisville, Ky., in an official letter to Secretary of War Hon. W. W. Belknap, in March, 1873, said:

WASHINGTON, D. C., *March* 10, 1873.

DEAR SIR: The bearer of this, J. W. Parish, is a gentleman with whom I am well acquainted and can vouch for his integrity and trustworthiness in any condition of life.

Very truly,

ROBT. ALLEN,
Brevet Major-General and Assistant Quartermaster-General, U. S. A.

Hon. W. W. Belknap, *Secretary of War.*

35 General Allen, in another letter to the Secretary of War in 1873, commending the patriotic spirit of J. W. Parish & Co. and others that came under his notice, said:

"For such as came to the front in the dark hours of the Government's peril, with their money and credit, as did J. W. Parish & Co., Pomroy & Benton, Child, Pratt & Fox, of St. Louis; Solomon Sturgess & Sons, of Chicago, with other firms, ought now to be met by the Government with a liberal spirit, for they proved themselves true and patriotic citizens of the Republic, and their efforts were greatly appreciated at that time by Government officials at St. Louis and Washington, and of course were valuable to the regiments in the field, and surely deserve the best attention of Congress and the Executive Departments, for it is a well-known fact that in the beginning of the war their acts started many a regiment to the front, and at a time the Government was in a helpless condition, without money or credit."

Hon. C. A. Dana, Assistant Secretary of War, in an official report to Secretary Stanton, dated January 27, 1864, says that—

"Parish & Co. faithfully executed their contract for ice last year at considerable loss."

Bills for the relief of Mr. Parish were introduced in the Fiftieth Congress and each succeeding Congress. Some of these have proposed to remedy the alleged injustice by allowing interest, while others

ave provided for a direct appropriation. On at least five of these here have been favorable reports.

Your committee therefore recommend the passage of this bill, hich will safeguard the interests of the Government and do justice the claimant.

The following is made a part of the report:

In the Matter of the Claim of JOSEPH W. PARISH
v.
THE UNITED STATES.

Mr. Joseph W. Parish asks the Congress in S. 475 to let the facts f his claim, as disclosed by the evidence heretofore taken, go to the ccounting division of the Treasury Department for an investigaion and decision according to the rule of damages laid down by the upreme Court of the United States in the case of the United States *v.* Behan (110 United States, 338).

It may therefore be interesting to know when said rule was laid lown in the United States, and under what circumstances, and in hat class of cases.

This rule was announced with much clearness and force in 1845 n the case of Masterton & Smith *v.* The Mayor of Brooklyn (7 Hill, 1), and this is the case quoted by the Supreme Court of the United States in the Behan case, *supra*. Masterton & Smith contracted to deliver 88,819 feet of marble to be used in the construction of the ity hall of Brooklyn, and had delivered 14,779 feet, for which they had been paid the contract price, when the defendant suspended work and refused any more marble. The plaintiffs had on hand at the quarry at the time the defendant suspended further delivery 3,308 feet prepared for delivery. And, to use the language of the court, "The contest arose out of the claim for damages in respect to the remainder of the marble, which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so."

In the American and English Encyclopedia of Law (2d edition), volume 8, page 622, we find the law of damages announced in the case of the United States *v.* Behan (110 U. S., 308) laid down as follows:

"Where profits are the very object of the contract: In many cases profits are the very object and inducement of the contract, and so understood by both parties, and then, therefore, they are not only recoverable, but constitute the true and exclusive measure of damages to the extent to which they may be ascertained."

In a note to the above section we find cases cited in the following States, where the above rule is laid down: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, Pennsylvania,

Tennessee, Texas, Utah, Virginia and Wisconsin. (Strauss *v.* Meertif, 64 Ala., 299, 307; Shoemaker *v.* Acker, 116 Cal., 239; Fell *v.* Newberry, 106 Mich., 542; Southerland on Damages (2d ed.), section 80).

In Williams *v.* Triplett (3 Iowa, 518, 531) the court said:

"On the day appointed he had the brick ready to deliver and so informed the plaintiff, who refused to receive them. * * * It was then not necessary for him to tender or deliver the brick. It is well settled that a tender or delivery may be dispensed with by the positive acts or declarations of the payee."

26 In Franklin *v.* Krum (70 Illinois App., 649, 652), which was a suit occasioned by the refusal to receive 900,000 feet of lumber, the court said:

"Apparently from the course of the trial, it seems that the appellant's contention was that from the making of the contract to the refusal of the appellant to carry out the same it was obligatory upon the appellees to have all the lumber on hand ready for delivery. Such is not the law. It was sufficient for the purposes of the contract if appellees had and were ready to deliver the lumber whenever appellant wished for it. Nor is the averment in the plaintiff's declaration, that from the execution of the contract, March 3, 1893, to the 1st day of November, 1893, they had been ready and willing to deliver all the lumber, compel appellees to prove that during this period they had in their possession all of such lumber. Nor were appellees, as is insisted, obliged to show that they tendered the appellant the lumber described in the contract."

In Nelson *v.* Elevating Company (55 N. Y., 480) it was said by Judge Allen:

"An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented, or expressly waived, by the party to whom performance is due."

The above quotation is approved by the Supreme Court of the State of New York in the case of Duryea *v.* Bonnell (45 N. Y., Supp., 435), and the court after approving the rule, laid down in Nelson *v.* The Elevating Company, *supra*, said:

"No tender was necessary, as the failure to deliver was produced by the defendant's refusal to receive," etc.

The Duryea case was an action by Duryea against Bonnell for refusal of defendant to receive a quantity of flour. The referee found that when defendant requested a quantity of flour from plaintiff, plaintiff would order the flour shipped from a mill direct to defendant, and that plaintiff owned no flour except as he purchased the same from the mill to fill orders. The court in passing on this case said:

"At the time when defendant should have taken the flour the firm was able and ready to deliver it. That it was not then delivered was the fault of the defendant. As he prevented the delivery in accordance with the terms of the contract we think it a salutary rule which holds him estopped from asserting that the firm did not go through all the technical forms of law in order to put him in

default. In order to permit the defendant now to assert that the firm was not ready to perform, when his own act prevented it, would permit his own breach of contract to constitute a defense, and he would advantage by his own wrong."

In support of the above see Ogden *v.* Marshall (8 N. Y., 340); Lawrence *v.* Miller (86 N. Y., 131); Eddy *v.* Davis (116 N. Y., 247); Hunter *v.* Wetsell (84 N. Y., 549).

It is laid down by Benjamin on Sales, that where there has been a breach of an executory contract of sale "if the postponement has taken place at the buyer's request he is estopped from denying that the seller was ready and willing to deliver within the contract time." (Benjamin on Sales, 6 ed., p. 664.)

The above doctrine, announced by Mr. Benjamin, has been followed by numerous courts in the United States, and among others the supreme court of the State of New York, as will be seen by examining the case of Duryea *v.* Bonnell, *supra;* and this doctrine is also laid down by the courts of England with approval. (Hockman *v.* Haynes, L. R., 10 C. P., 598; Ogle *v.* Earl Vane, L. R., 3 Q. B., 272.)

"It is not necessary, in order to maintain an action on the contract, to show actual tender; readiness and willingness is enough." (Tiffany on Sales, p. 179.)

In Kingsland, etc., Manufacturing Company *v.* St. Louis, etc., Company (29 Mo. App., 527) the court said:

"The law is that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would be made that the tender would not be accepted (McKnight *v.* Wilkins, 6 Mo. App., 118); or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused."

In the syllabus of said case we find this language:

"The duty of offering to the defendant the article contracted for is dispensed with when the plaintiff has informed the defendant of their readiness for delivery, and asked for instructions, which the defendant refuses to give, or when the defendant has placed himself in a position from which it clearly appears that the offer would be refused."

In Scribner *v.* Schenkel (128 Cal., 250) the court, in substance, said: Where defendant received part of the hogs and paid for them, and declined to pay for more of them, there was a breach of the contract, and the plaintiff could enforce the contract without further delivery or offer of delivery, and the measure of damages is the difference between the contract price and the market price.

In the case of Dustan *v.* McAndrew (44 N. Y., 72, 78), the court said:

"A vendor of personal property in a suit against the vendee
37 for not taking and paying for the property has the choice ordinarily of either one of three modes to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the

difference between the contract price and the price obtained on such sale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

The case of Hayden *v.* Demets (53d N. Y., 426, 429) was a suit to obtain the contract price for 50,000 pounds of copper. The court said:

"The goods were ponderous and bulky, and in such a case a manual delivery is unnecessary. It is enough if they are placed in the power of the vendee. * * * He had the copper and offered it to the defendants. The law requires good faith and such acts only as are practicable, and according to the thing tendered and the nature of the business."

The cases here cited, as well as all similar cases, applying the rule of damages announced in the Behan case, are cases in most instances, if not all, where the vendor has gone to expense and trouble to possess himself of the merchandise or goods necessary to meet his contract with the vendee. It may be that the vendor at expense and trouble has prepared to deliver marble from a quarry, or he may have bought machinery and raw materials and begun to manufacture goods to be delivered in fulfillment of his contract.

The reason for the rule of damages in question is therefore apparent. A less exacting rule would in many cases permit the vendee to take advantage of his own wrong to the very great injury of the vendor, who at much expense and trouble had prepared to comply with the terms of the contract.

Another reason for the rule, heretofore stated, is that such contracts as we now contemplate have for their very object the obtaining of profits, and this is well understood when the parties execute the same. And for this reason profits are recoverable because they constitute the true and exclusive measure of damages when ascertained.

The rule of damages which could have been invoked by the Government, provided Mr. Parish had not lived up to the terms of his contract, is one fraught with peculiar danger to one taking a contract like the one entered into by Mr. Parish.

If the Government had revoked the order suspending the delivery of the ice, and had again ordered the delivery of the same, what would have been the rule of damages in a suit on behalf of the United States against Mr. Parish, provided he had failed to deliver the ice? The following is undoubtedly the rule:

"In a contract for the sale of goods the measure of damages for failure to deliver is the difference between the contract price and the value of the article in the market at the time and place of delivery." (Rahm *v.* Deig, 121 Ind., 283, 287; Loescher *v.* Deisterberg, 26 Ill. App., 520; Faulkner *v.* Closter, 79 Iowa, 15; Messmer *v.* Lead Co., 40 N. Y., 422, 427.)

The Iowa case of Faulkner *v.* Closter was occasioned by the failure to deliver at Kirkman a carload of potatoes, 400 bushels, and the court in stating the rule of damages said:

"There seems to be no dispute as to the rule of damages in such

cases—that is, that the difference between the contract and market price at the point of delivery is the true rule," etc.

In the New York case of Messmer *v.* Lead Company, and the Indiana case of Rahm *v.* Deig, the courts lay down the rule as follows:

Where a person sells a merchantable article to another and fails to deliver, "the general rule is that the purchaser is entitled to recover the difference between the contract price and the value of the article in the market at the time and place of delivery."

Conclusion.

In the light of the undisputed facts of Mr. Parish's case, and the measure of damages clearly applicable to the same, it is apparent, we think, that the decision of the Supreme Court in Parish *v.* The United States (100 U. S., 500) is erroneous.

In an appeal from the Court of Claims to the Supreme Court of the United States only such statement of facts can be brought to the Supreme Court as may be necessary to enable it to decide upon the propositions of law ruled on by the Court of Claims, and that must be presented in the shape of facts found by the court and not by the evidence in detail. (De Groot *v.* The United States, 5 Wall., 419.)

The error of the Supreme Court was due, we think, to altogether overlooking the ninth finding of fact of the Court of Claims in Mr. Parish's case. In fact, we can not reconcile the decision of the Supreme Court with any other opinion. The ninth finding of fact is as follows:

38 "IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

In the case of Parish *v.* The United States, *supra*, the court said: "If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver, and demanded payment. * * * Had they offered to deliver, and been in condition to deliver, or to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages," etc.

Your committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in Masterton and Smith *v.* The Mayor of Brooklyn (7 Hill, 61, 69), followed and approved in the Behan case, *supra*, is the true measure of damages clearly applicable to claimant's case.

39 RELATOR'S EXHIBIT No. 4.

Filed May 2, 1906.

Notice of Allowance of Claim.

Treasury Department, Office of Auditor for the War Department.

Claim No. 143,880, File No. 58743.

WASHINGTON, D. C., *August* 11, 1903.

To Joseph W. Parish care of Attorney, J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due you under Act of Congress app'd Feb. 17, 1903 (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled, as shown in the following statement and settlement certificate No. 23729, transmitted to the Secretary of the Treasury for payment:

Amount claimed.	Amount disallowed.	Amount allowed.
		$181,358.95

Respectfully, F. E. RITTMAN, *Auditor*,
By W. A. R.

Copy.

"Any person accepting payment under settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted * * * Any person whose accounts may have been settled by an Auditor of the Treasury Department * * * may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive."—*Section* 8, *Act July* 31, 1894.

40 *Answer of Respondent.*

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

vs.

LESLIE M. SHAW, Secretary of Treasury.

Answer of the respondent, Leslie M. Shaw, Secretary of the Treasury, to the rule to show cause and to the petition of the relator filed herein.

1. The defendant admits the averments of paragraph one. But defendant avers that the rights of said Joseph W. Parish under the

Act of Congress of February 17, 1903, in said petition referred to, if any such rights existed, were mere personal rights of the said Joseph W. Parish and were not property which could pass under his will, or to his personal representatives.

2. Defendant admits the averments of paragraph two.

3. Defendant admits that the statement was made by Horace S. Cummings as set forth in paragraph three, but says that the same is immaterial to the issues involved herein.

4. Defendant admits the sending of the letter copied in paragraph four, but denies that it appears that said Parish was effectually performing his part of the contract when the said letter was sent.

5. Defendant admits the averments of the fifth paragraph,
41 but says that the findings of the Court of Claims are absolutely immaterial to any issue involved herein, as the Act of Congress hereinafter referred to, and under which your defendant acted, provides that the said determination of your defendant shall be upon the evidence in said cause, and not upon any finding of said Court of Claims.

6, 7 & 8. Defendant, answering the sixth, seventh and eighth paragraphs of said petition, admits the said matters therein contained, but says that the said paragraphs contain matters of law and state no facts material to the issue involved herein.

9. Defendant neither admits nor denies that the 16000 tons of ice at Lake Pepin was lost, but denies that the 1232 tons of ice was lost; defendant further says that the statements in this paragraph are apparently findings of fact by the petitioner on the testimony before the Court of Claims, and that such findings by petitioner are not material, the said Act vesting in defendant the right to review said evidence and make such findings as seem right and proper to him.

10. Defendant admits the averments contained in the tenth paragraph of said petition, but says that the same are immaterial to any issue involved herein.

11. Defendant admits the passage of the Act of February 1886, and that the sum therein appropriated was paid to Joseph W. Parish, but defendant denies the conclusions of law attempted to be deducted from said Act as alleged in said paragraph.

12. Defendant admits that the payments were made as in said twelfth paragraph alleged, but says that the other averments
42 of said paragraph are wholly immaterial to any issue involved herein.

13. Defendant admits the passage of the Act of February 17, 1903, a copy of which is attached thereto in the petition as exhibit 3, but which is incorrectly quoted in said paragraph 13.

14. Defendant denies that the said Act of February 17, 1903, is a plain direction to defendant to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper government accountant; but vested in your defendant the sole right and duty to determine what amount, if any, is due the said Joseph W. Parish. Further answering said paragraph defendant

says that the reports of the committees referred to are immaterial to any issue involved in the present case.

15. Answering the fifteenth paragraph the defendant says that the said Parish was not able to deliver said ice as in said paragraph alleged, and that defendant, after a full consideration of all of the evidence in the Court of Claims on this question, has decided that the said Parish was not able to deliver the said ice as in this paragraph alleged. Defendant further says that the matters and things set out in the fifteenth paragraph of said petition are wholly immaterial to any issue involved herein.

16. Defendant denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered
43 under said contract. Defendant further says that the said Court of Claims found, as a fact, that said profits could not be ascertained, their finding being the twelfth specification, which reads as follows:

"XII. The profits which the claimant would have made upon 30,000 tons of ice, less 12,768 tons, to wit, 17,232 tons, if the same had been accepted by the defendants' officers in the manner prescribed by the order of 25th March, 1863, were $— per ton, amounting to $—. The loss sustained by the claimant upon the 10,000 tons of ice purchased and lost at Lake Pepin was $— per ton."

Defendant further says that the matters and facts contained in said sixteenth paragraph are wholly immaterial to any issue involved herein.

17. Defendant denies that the evidence in the Court of Claims shows that the transportation of ice at Lake Pepin and elsewhere was practicable. Defendant further says that after a thorough consideration of all of the evidence in the Court of Claims on this question, he decided that said transportation of ice from Lake Pepin was impracticable. Defendant further says that the matters and things set up in said seventeenth paragraph of said bill are wholly immaterial to any issue involved herein.

18. Defendant says, as will be hereafter more fully set forth, that defendant has determined and stated the full amount due said Parish in accordance with the evidence collected in the case in the Court of Claims, and under the rule for the measure of damages in the case of United States *v.* Behan. Defendant further admits that, as will be hereafter more fully set forth, defendant referred the case to the Auditor for the War Department for the latter's examination and advice thereon, and that the said Auditor examined and
44 stated the said account in the terms set forth in said paragraph; defendant further says that on the 26th day of January, 1904, the said Auditor revised his said statement and found that nothing was due the said Parish on said claim.

19. Defendant admits that the quotations in said paragraph are taken from a report made to said Auditor for the War Department by a clerk in his office under the title of "Law Board" which report was made by said clerk solely for the advice and assistance of said Auditor in making his report to defendant. Defendant says that

the averments of this paragraph are wholly immaterial to any issue in the present case.

20. Defendant admits that the said Auditor for the War Department sent to Parish a letter, a copy of which is set forth in said paragraph, but that said letter was sent before the said Auditor revised his said statement of said account. Defendant further says that the matters contained in said twentieth paragraph are wholly immaterial to any issue involved in this case.

21. Defendant denies each and every allegation contained in the twenty-first paragraph of said petition. Defendant further says that the allegations therein contained are wholly immaterial to any issue involved herein.

22. Defendant denies that every prerequisite for the payment of any money to Parish has been complied with.

Defendant further says that on the 31st day of May, 1904, he decided that under the said Act of Congress of February 17, 1903, there was no balance due to the said Parish, and therefore declined to pay any money to said Parish.

45 23. Further answering said rule to show cause and said petition, this defendant says:

That after the passage of the said Act of Congress of February 17, 1903, and at the request of said Parish, defendant, as Secretary of the Treasury, took up for consideration the said claim of said Parish; that thereupon defendant requested his subordinate, the Auditor for the War Department, to examine and settle the said account and to report to defendant his opinion and advice thereon; that the said Auditor examined the said account, and on the 11th day of August, 1903, stated the same as set forth in paragraph 18 of the petition, and on the same day transmitted his certificate of statement to defendant for his action; that on the 12th day of August, 1903, defendant referred said account to his subordinate, the Comptroller of the Treasury for re-examination, and for his opinion and advice thereon; and that said Comptroller re-examined the said claim, and on the 21st day of January, 1904, advised defendant that in his opinion there was nothing due to said Parish under said Act of February 17, 1903, and revised the said account; and that on the 26th day of January, 1904, pursuant to said revision of said Comptroller said Auditor cancelled the certificate theretofore made by him, and certified that there was nothing due said Parish on account of said claim; that defendant also referred the matter to the Solicitor of the Treasury and requested the latter's opinion and advice thereon, and on the 12th day of January, 1904, said Solicitor of the Treasury advised defendant that in his opinion there was nothing due

46 to said Parish under said Act of Congress on account on said claim. That thereafter, and pursuant to the authority and direction of said Act of February 17, 1903, defendant, acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him under the contract described in said Act of Congress, and into the evidence in the case collected in the United States Court of Claims, and, after and upon

such full and complete examination, and upon full and deliberate consideration thereof, and of the said opinions and advice so theretofore at his request given to him by his said subordinates and the said Solicitor of the Treasury as hereinbefore set forth, and in the exercise of the judgment and discretion conferred upon him by said Act of Congress, did, on the 31st day of May, 1904, determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court in the said case of United States against Behan, and in accordance with the evidence in the case collected by the Court of Claims, and did deduct therefrom all payments which have been made to said Parish, and did determine and ascertain and state that, under the said rule and evidence, no balance is due to said Parish on account of said claim; a copy of said determination of this defendant is hereto attached marked "Exhibit A" and made a part hereof.

L. M. SHAW.

DANIEL W. BAKER,
Attorney for Defendant.

47 DISTRICT OF COLUMBIA, *ss:*

Leslie M. Shaw, being first duly sworn, upon his oath deposes and says that he is Secretary of the Treasury and as such secretary is the defendant named in the foregoing answer; that he has read the said answer, and that the matters and things therein set forth of his own knowledge are true, and those set forth upon information and belief he believes to be true.

L. M. SHAW.

Subscribed and sworn to before me this 25" day of May, A. D. 1906.

[SEAL.] JAS. N. FITZPATRICK,
Notary Public.

48 Filed June 2, 1906.

TREASURY DEPARTMENT, WASHINGTON, *May* 31, 1904.

In the Matter of the Claim of JOSEPH W. PARISH under Act of Congress Approved February 17, 1903.

After a careful examination of the contract with J. W. Parish & Co., referred to in the act, and the evidence taken before the Court of Claims, and construing both in the light of the opinion in the case of the United States *vs.* Behan, which, under said act, is to govern, I have reached the conclusion that there can be no recovery by J. W. Parish or J. W. Parish & Co., in excess of the amount already received by them.

This conclusion is to my mind irresistible upon any one of several theories. A contrary conclusion can be reached only by relying upon

a single clause of the act which directs the Secretary of the Treasury to determine and ascertain the full amount which should have been paid said J. W. Parish & Co. "if the said contract had been carried out in full without change or default made by either of the parties thereto." The claimant urges this construction, but seems to forget that if the contract had not been changed by a letter bearing date of March 25, 1863, there could be no recovery. The contract is for the delivery at certain points of the "whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." The claimant bases his right
49 to recover upon the modification of this contract by the letter referred to, which directs him to make immediate delivery of 30,000 tons. Certainly it was not the intention of Congress to ignore this letter; but if the interpretation sought by the claimant is to prevail strictly and literally, then the letter must be ignored. Of course the claimant asks that the letter ordering the immediate delivery of 30,000 tons of ice be made a part of the original contract.

But I do not think the language of the act justifies the exclusion of all that follows the phrase I have quoted, for it is separated only by a comma from specific instruction to continue the contract and the evidence "under the rule of the measure of damages laid down by the Supreme Court in the case of the United States *vs.* Behan." The letter of March 25, 1863, was an order for $630,000 worth of ice, and under that contract J. W. Parish & Co. have received, in one way and another, $311,275.91. If the phrase in the act contended for by claimant is to prevail, there was no occasion to refer the matter to the Secretary of the Treasury for computation, for a child would know that if there had been no default by either party there would still be due Parish & Co. $318,724.09. And it is reasonable to suppose that Congress would have appropriated that amount if it had intended that the claimant should receive that much.

The act forbids the claimant's conclusion, for it specifically provides that the computation shall be made "under the rule of the measure of damages laid down by the Supreme Court in the United States *vs.* Behan." The rule referred to, and which alone
50 must govern, gives the measure of damages where default has been made. It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only when a vendee makes default, if the contract is to be construed as though no default had been made. The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default and did refuse to receive, or at least suspended its order for 30,000 tons of ice.

The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters. The evidence is clear, however, that Parish & Co. purchased 10,000 tons, and there is some evidence to support their claim that they purchased 16,000 tons of ice on Lake Pepin. It is also reasonably clear that they purchased at various other places an aggregate of 18,343 tons. The firm delivered to the Government and received pay for 12,771 tons, and they have been paid the cost of the re-

mainder of the more than 34,000 tons claimed to have been purchased by them preparatory to the fulfilment of their contract. The present controversy is confined to prospective profits on the undelivered ice.

The evidence clearly shows that owing to a mild winter there was a short crop of ice, and the evidence is equally clear that there was a correspondingly ready market for ice during the summer of 1863; and that prices for ice were fabulously high. It is in evidence
51 that the Government, after making demand upon Parish & Co. under its contract, actually paid as high as $100 per ton for ice during that summer.

Parish & Co. claim that a portion of the ice purchased elsewhere than on Lake Pepin went to waste, and they claim prospective profits thereon. The ice purchased elsewhere than on Lake Pepin was all available for transportation, and if it went to waste it was because of neglect. No language in the Behan case, or in any other case, will justify a vendor in holding the subject of a rescinded sale, in the face of an advantageous market, until wasted or ruined by age, and then prosecuting an action for prospective profits. I consider it unthinkable that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil while declining to fill orders from the Government, and in the face of a market value many times the contract price.

This disposes of all but the ten or sixteen thousand tons of Lake Pepin ice. When Parish & Co. executed their contract to furnish all the ice that the Government might require at designated points on the Mississippi River, ordinary prudence required them to make preparation to fill such orders as might from time to time be received. I will not go so far as to conclude that Parish & Co. should have purchased 34,000 tons, though I do not think a purchase of that amount would be considered unreasonable, even in the absence of the letter of March 25, 1863.

But conceding Parish & Co. claim that their purchases on Lake Pepin would not have been made but for this letter, it
52 does not follow that they should have abandoned the Lake Pepin ice on the strength of the letter of the Assistant Surgeon-General, written six days later, suspending the order until "further instructions should be given." There is nothing in this subsequent letter of suspension to indicate that the Government had decided to accept any less amount than 30,000 tons, or that it had waived its right to demand 50,000 tons, or any other amount if more should be needed. The letter simply suspends the order for the immediate delivery of 30,000 tons "until further instructions are given." Parish & Co. as reasonable men, must act reasonably. On receipt of this letter Parish & Co. found themselves the owners of 16,000 tons of ice on Lake Pepin, and they were under contract to deliver to the Government, at certain places, all the ice it might require. As reasonable men they know there was but one season of the year when ice could be taken from Lake Pepin. It is in evidence that Parish & Co. fully understood the situation, for they sent a gang of men to Lake Pepin and held them there awaiting orders

for over a week, but because of low water no boats or barges could reach the lake. Unable to remove the ice which cost them in the main $2.50 per ton, it ultimately spoiled notwithstanding a market at $100 per ton down the river.

No language in the Behan case justifies the recovery of prospective profits for merchandise which the vendor not only fails to render, but is likewise unable to deliver. Conceding that when a contract is countermanded the vendor is excused from tendering the
53 subject of the sale, he certainly cannot recover without proof of ability to make delivery. For instance, Parish & Co. could not recover even the cost of ice purchased in Alaska to fill a contract subsequently rescinded, without proving that it was physically possible to deliver the ice from Alaska, and they could not recover prospective profits thereon without proof that it could be delivered under the contract at a profit. The evidence fails to show that at any time after March 25, 1863, Parish & Co. could have delivered the ice from Lake Pepin had they sought so to do. There had been put up during the previous winter on Lake Pepin by various parties, as the evidence shows, about 40,000 tons of ice, of which fully 34,000 tons were never moved, and at least one shipment of the 6,000 tons or so that were shipped all melted in transit. In view of the ice famine at Chicago and points south, it is evident that cheap transportation from Lake Pepin was wanting.

Counsel insist that because it is shown that at some times, in some years, and at one time in the year 1863, ice could have been and actually was taken from the lake to regularly navigable points on the river, therefore a recovery is authorized in this case. I reach no such conclusion. The natural and reasonable obligation of Parish & Co. to get the ice out of the lake to be ready to meet the suspended order, when the "further instructions" mentioned in the letter of suspension should be received, coupled with the fact that they did try and failed, is conclusive to my mind that it was impossible to deliver the ice, and if impossible, then prospective profits cannot be re-
54 recovered.

This view of the case is in strictest harmony with the familiar rule on which the claimant relies and by which the Secretary of the Treasury is to be controlled, as expounded, rather than promulgated, in United States *vs.* Behan. I quote from the opinion:

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

Parish & Co. have been paid the first of these two items. They

have been paid what they expended towards the performance of their contract, to-wit, the cost of the ice, and this they have been paid without deducting the value of the ice left on their hands. They seek to recover in this instance because of an alleged breach of contract. If there was a breach of contract that breach occurred on March 31, 1863, at which time they claim to have owned 16,000 tons of ice on Lake Pepin and a quantity of ice elsewhere. They have been paid the cost both of the Lake Pepin ice and the other undelivered ice purchased elsewhere, without deducting its value on March 31st. In other words, the Government has paid them the cost of the ice and then given them the ice.

This investigation relates solely to the second item referred to in the quotation from the opinion as "profits that would have
55 been realized by performing the whole contract." But the Court lays down the rule (and it is by this rule that the Secretary of the Treasury is to be governed in deciding this case) that profits cannot be recovered when "remote and speculative in character." Getting ice from Lake Pepin to the southern waters of the Mississippi River during the spring and summer of 1863 was admittedly a precarious enterprise, and the profits to be derived from such a transaction must be equally remote and speculative. The claimant invokes the rule laid down in United States *vs.* Behan, and that rule declares that profits cannot be recovered when "incapable of that clear and direct proof which the law requires." The Secretary of the Treasury is also directed in the act to confine his investigations to the evidence taken before the Court of Claims, and that evidence contains "no clear and direct proof" as to the profits that might have been made had the ice been delivered.

Parish & Co. brought suit in the Court of Claims originally for $60,000, which included prospective profits, and by an amended petition they increased their demand to $250,887.72. But counsel for Parish & Co. virtually concede that the evidence does not justify prospective profits, for they ask the Court of Claims in its finding of facts to fix their damages at $65,737.70.

The Act of Congress under which this investigation is being made limits the Secretary of the Treasury to the evidence taken before the Court of Claims. If the evidence there taken was insufficient to justify counsel for claimants to ask a finding covering pros-
56 pective profits, the same evidence is insufficient to allow the payment of prospective profits under the act.

Under the original contract Parish & Co. were to be paid "for each and every ton of ice delivered and accepted by the Medical Officer in charge." The fact that payments were to be made from time to time upon "receipted bills of lading and duplicate accounts certified by the Medical Officer in charge," constitutes no modification of the previous provision. The contract was to be completed by delivery of the ice at certain specified points. The subsequent clause concerning payments does not have the effect of rendering the contract complete by delivery of the ice f. o. b. cars or boats. Parish & Co. must have so understood the contract, for they purchased something over 34,000 tons with which to fill the order for

30,000 tons, and they have successfully prosecuted their claim for the cost of the entire purchase. This must be upon the theory that they were to be paid for the ice actually delivered, and that in order to deliver 30,000 tons, the purchase of 34,000 tons was not unreasonable. The evidence shows that some shipments of ice to Mississippi River points lost by meltage 33 per cent., and some shipments from Lake Pepin 100 per cent. The profits in shipping ice from Lake Pepin in 1863 are therefore "incapable of that clear and direct proof which the law requires."

The claimants have nothing of which they can legitimately complain. They contracted to deliver the "whole amount of ice required to be consumed at or in the vicinity" of certain points on the Mississippi River and its southern tributaries. The ice was to be
of quality "A No. 1." They were to receive pay "for each
57 and every ton of ice delivered and accepted by the Medical Officer in charge." As a matter of fact they have received pay for more than 1600 tons of melted ice ($31,743.00). They were to deliver all the ice required at these several points. But the fact appears of evidence that the Government made demand for ice which the claimants failed to deliver, and that thereafter the Government paid $100.00 per ton therefor, and it has never made a claim against Parish & Co. for damages. Under their contract to deliver all the ice that was required, they claim to have purchased 34,000 tons, some of it so situated that it could be easily delivered, and as the evidence shows, 10,000 or 16,000 tons at a point whence it could not be delivered. The Government has paid the contract price for all it has received, and has accepted and paid for 1600 tons of water, and has paid the claimants, in addition, all their expenses not only in connection with the 16,000 tons of ice at Lake Pepin, which the evidence fails to show could have been delivered, but also paid for upwards of 4,000 tons at available points, and has made no claim for the value of any of this ice left in the hands of Parish & Co. The original claim made by Parish & Co. in the Court of Claims was for $60,000. By an amendment subsequently filed the claim was increased to a little less than $252,000. After the evidence was all in, counsel for claimants asked judgment for a little over $65,000. The Court of Claims allowed $10,444, and by a special appropriation they have been paid $58,341 additional. This is $8,000 more than their original claim, and $3,000 more than was asked after the evi-
58 dence was all in. Counsel for the claimants now ask $181,358.95, which is the amount conceded to be due, if any thing, under the act. I reach the conclusion that nothing is due.

That J. W. Parish was an energetic, patriotic citizen there is abundant proof. He fitted a regiment at his own expense, and in many ways inspired the community in which he lived and the people whom he met with a spirit of patriotism at that time much needed. But if it is to be rewarded in any sum in excess of what has already been paid, Congress must fix the amount by specific appropriation.

L. M. SHAW.

59 *Demurrer to Defendant's Answer.*

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

v.

LESLIE M. SHAW, Secretary of U. S. Treasury.

1. The plaintiff says the allegation in the first paragraph of respondent's answer, that the rights of said Joseph W. Parish, acquired under the Act of February 17, 1903, were not property which could pass to his personal representatives, is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer is that said rights are in the category of rights of property, which do pass to the personal representative of said Parish.

2. The plaintiff says that the 4th paragraph of respondent's answer is bad in substance in that it states no facts to justify the denial contained therein.

3. The plaintiff says that the 5th paragraph of respondent's answer is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer, is that said Act of Congress of February 17, 1903, does make the findings of the Court of Claims material, and does not permit the Secretary of the Treasury to substitute his own findings therefor.

60 4. The plaintiff says that the 9th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing that the said paragraph states no fact to justify the denial "that the 1232 tons of ice was lost;" and further that it erroneously construes said Act, as "vesting in defendant the right to review said evidence and make such findings as seem right and proper to him."

5th. The plaintiff says that the 14th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer that said paragraph erroneously construes the said Act of February 17, 1903; and further that as matter of law, "the reports of the Committees referred to" are material to the issue involved in the present case.

6. The plaintiff says that the 15th paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer, it will be argued that the respondent's denial is insufficient, for the reason that it states no facts to justify it. It is therefore an insufficient denial.

7. The plaintiff says that the 16th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated therein to justify the denial. It is therefore an insufficient denial.

8. The plaintiff says that the 17th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated to justify the denial that the transportation of ice
61 was practicable. It is therefore an insufficient denial.

9. The plaintiff says that the 18th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer, that the respondent has not stated the amount due said Parish under the rule for the measure of damages in U. S. *v.* Behan; and further that the respondent states no facts to justify his refusal to issue a warrant in accordance with the Auditor's report, or to justify his own arbitrary compulsion to the Auditor to cancel the arithmetical result the Auditor had been directed to ascertain, and had ascertained.

10. The plaintiff says the 21st paragraph of respondent's answer is bad in substance, for the reason that not one fact is stated to justify the denial of plaintiff's allegations therein contained. It is therefore an insufficient denial.

11. The plaintiff says that the 22nd paragraph of respondent's answer is bad in substance, for the reason that no facts are stated to justify the denial therein contained. It is therefore an insufficient denial.

12. The plaintiff says that the 23rd paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer it will be argued, that said paragraph states no fact to justify the attempted re-cission by the Secretary of the Treasury of the account stated by the Auditor for the War Department on the 11th day of August 1903; nor any facts to warrant the steps thereafter taken by the respondent to give countenance to an arbitrary refusal to pay the sum, so found due to said J. W. Parish, by exact and competent computation, in the way provided by Congress.

62 13. The plaintiff says, that the whole answer of respondent is bad in substance.

NOTE.—At the hearing of the demurrer to respondent's answer, it will be argued:

a. That said answer is demurrable, unless it shows a right to refuse obedience, by the statement of facts, which justify such refusal clearly, specifically, and with such certainty, that the Court can see, that if admitted or established, they furnish a legal alternative for obedience to the writ;

b. That a demurrer to the assertion or denial of a legal conclusion, without showing the facts, which support or forbid such conclusion, must always be sustained.

c. That if any pleading misstates the effect of a Statute, the adverse party, in demurring, does not admit the correctness of the con-

struction claimed, or that the Statute imposes the obligation or confers the rights alleged;

d. That the return to the writ of mandamus must state all the facts relied upon by the respondent with such precision and certainty, that the Court may be fully advised of all the particulars, necessary to enable the Court to pass upon the sufficiency thereof; and the statements of the return cannot be supplemented by inference or intendment.

HOLMES CONRAD,
Of Counsel for Pet'r.
LEIGH ROBINSON,
Of Counsel for Plaintiff.

63 Supreme Court of the District of Columbia.

WEDNESDAY, *February 13th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 48507. At Law.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Petitioner,
vs.
LESLIE M. SHAW, Secretary of the United States Treasury.

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibit and affidavit, and the demurrer to said answer. Whereupon, after argument thereon by attorneys for the respective parties, it is considered and adjudged that the prayers of the petition herein be, and hereby are denied, the rule to show cause discharged and the petition dismissed at the costs of petitioner.

From the aforegoing the petitioner by *his* attorneys in open Court, notes an appeal to the Court of Appeals. Whereupon, bond for costs is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

February 19, 1907.—Appeal bond filed.

64 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of District of Columbia, hereby certify the foregoing pages, numbered from 1 to 63, both inclusive, to be a true and correct transcript of the record, according to Rule Five (5) of the Court of Appeals of the District

of Columbia, in cause No. 48507, at law, wherein The United States *ex rel.* Emily E. Parish, Executrix, &c., is Relator, and Leslie M. Shaw, Secretary of the United States Treasury, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22d day of March, A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1771. The United States *ex rel.* Emily E. Parish, executrix, &c., appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Court of Appeals, District of Columbia. Filed Mar. 22, 1907. Henry W. Hodges, clerk.

TUESDAY, *April 2nd, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

LESLIE M. SHAW, Secretary of the United States Treasury.

The retirement of Leslie M. Shaw, the appellee herein, and the appointment of George Bruce Cortelyou, as his successor as Secretary of the United States Treasury, having been suggested, It is, upon motion of Mr. Leigh Robinson, of counsel for the appellant, now here ordered by the Court that the said George Bruce Cortelyou, Secretary of the United States Treasury, be, and he is hereby, made the party appellee in this cause.

TUESDAY, *May 7th, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

The argument in the above entitled cause was commenced by Mr. Leigh Robinson, attorney for the appellant, and was continued by Messrs. J. C. Adkins and D. W. Baker, attorneys for the appellee, and was concluded by Mr. Holmes Conrad, attorney for the appellant.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

v.

GEORGE BRUCE CORTELYOU, Secretary of the Treasury.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is a petition for a writ of mandamus to compel Leslie M. Shaw, as Secretary of the Treasury, to issue a draft in favor of the petitioner for the sum of $181,358.95 in payment of a claim referred to him by Act of Congress, approved February 17, 1903. The petition was filed May 2, 1906, and return made thereto by Leslie M. Shaw. After appeal perfected, Leslie M. Shaw resigned the office of Secretary of the Treasury, and George Bruce Cortelyou, as his successor in office, has been made a party in his stead.

Petitioner is the duly qualified executrix of the will of Joseph W. Parish who died April 7, 1905.

The material facts concerning which there is no substantial disagreement are these: On March 5, 1863, J. W. Parish & Co. (to whose right Joseph W. Parish succeeded) contracted with the United States to deliver to them all ice required to be used by their Medical Department during the remainder of that year. Deliveries were required to be made as required at Nashville for $25 per ton; at Cairo and Memphis for $20 per ton; and at St. Louis for $15 per ton. On March 25, 1863, the Department wrote the contractors that the ice contracted for must be delivered without delay as follows: at St. Louis 5000 tons; at Cairo 5000 tons; at Memphis 10,000 tons; and at Nashville 10,000 tons. March 31, 1863, an instruction was sent the contractors, and received by them April 2, 1863, suspending the order until further instructions. At that date 12,768 tons had been delivered and paid for at the contract price. The order of suspension was never recalled. Under the authority of an Act of Congress approved May 31, 1872, Parish brought suit against the United States, in the Court of Claims to enforce his demand under said contract. The Court of Claims dismissed the suit. 12 Ct. Cl., 620. On appeal, that judgment was reversed by the Supreme Court of the United States and the case remanded with direction to ascertain the damages sustained by the claimant. 100 U. S., 500. The Court of Claims then rendered a judgment for the claimant for the sum of $10,444.91. 16 Ct. Cl., 642. Claimant then petitioned Congress to satisfy as much of his claim as had not been allowed by the Court of Claims. Responding to a reference by a Committee of the House of Representatives, the War Department, through the Surgeon General, reported that the whole of the undelivered ice, through the order of suspension, amounted to 17,232 tons, and that the same had been lost by the contractor. The report also stated that under the evidence before the Court of Claims, and additional evidence before the Department, Parish was entitled to be re-imbursed, in addition to the judgment of the Court of Claims in the sum of $8,341.95, for the loss he had sustained because of the non-delivery of the 17,232 tons of ice. After this report, on February 20, 1886, Congress passed an act directing the payment of said sum of $8,341.85 to Parish, in addition to said sum of $10,444.91, "being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for, but were wholly lost to said Parish." 24 Stat., 653. Parish again applied to Congress for relief and on February 17, 1903, the following Act was passed:

An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue

of a contract made by J. W. Parish and Company with Henry Johnson, a medical store-keeper, acting on behalf of the United States, which contract bears date March 5, 1863, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; St. Louis, Mo.; and Cairo, Ill., during the remainder of the said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One hundred and tenth United States Reports, three hundred and thirty-eight), and in accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated."

"Approved, February 17, 1903."

The bill resulting in the Act aforesaid was accompanied by an elaborate Committee report, which is made an exhibit to the petition. This report gives a history of the Parish claim and the litigation concerning it. The findings of fact by the Court of Claims are set out and commented on, and it is said that the decision reported in 100 U. S., 500, is erroneous, because the Court overlooked the Ninth finding of the Court of Claims regarding Parish's readiness to deliver the remainder of the 30,000 tons of ice. The report, as a whole, is an argument in favor of Parish's right to further and complete compensation, and is relied on by the appellant as showing the plain meaning of the Act aforesaid, thereafter adopted. In the conclusion of the report, and referring to a former report, it is said:

"In that report the committee state that the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court of the United States in the case of the United States *v.* Behan.

"The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts.' It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings

before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

"If the United States owes the claimant, this fact will be disclosed and he will be paid. If it does not owe him, that will also be brought to light, and in either event a final determination be reached."

"Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates."

The petition alleges that the matter was referred to the Auditor of the War Department after the passage of the Act aforesaid, who stated an account showing the entire contract price, and after deducting the various payments made to Parish, and the sum of $137,385.12 as "amount saved on non delivered ice," showed a balance due Parish of $181,358.95, of which he was notified. And a report of the "Law Board" of the Department is alleged, showing the approval of this account as being in accord with the intention of Congress as expressed in the Committee report and the Act aforesaid. The petition alleges that this report of balance was authoritative, and all that remained for the respondent "was a purely ministerial act in obedience to and in execution of the clearly expressed will of the law-making power, so that the said Act of February 17, 1903, from and after the report or statement of account of said Auditor for the War Department became and was mandatory upon the defendant." The prayer is for a writ of mandamus requiring the respondent, as Secretary of the Treasury, to issue a draft to the petitioner for the said sum of $181,358.95, as found by the Auditor. Some extracts from the evidence before the Court of Claims, and the Surgeon General thereafter, are given in the petition, but there is no transcript of the entire evidence in either the petition or the return thereto.

The return of the respondent admits the general facts before recited, but denies the conclusions therefrom. The material allegations of the return are the following:

"15. Answering the fifteenth paragraph the defendant says that the said Parish was not able to deliver said ice as in said paragraph alleged, and that the defendant, after a full consideration of all the evidence in the Court of Claims on this question, has decided that the said Parish was not able to deliver said ice as in this paragraph alleged.

"16. Defendant denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered under said contract.

"17. Defendant denies that the evidence in the Court of Claims shows that the transportation of ice at Lake Pepin and elsewhere was practicable. Defendant further says that after a thorough consideration of all the evidence in the Court of Claims on this question, he decided that said transportation of ice from Lake Pepin was impracticable.

"18. Defendant says, as will be hereafter more fully set forth, that defendant has determined and stated the full amount due said

Parish in accordance with the evidence collected in the case in the Court of Claims, and under the rule for the measure of damages in the case of United States *v.* Behan. Defendant further admits that, as will be hereafter more fully set forth, defendant referred the case to the Auditor for the War Department for the latter's examination and advice thereon, and that the said Auditor examined and stated the said account in the terms set forth in said paragraph; defendant further says that on the 26th day of January, 1904, the said Auditor revised his said statement and found that nothing was due the said Parish on said claim.

"19. Defendant admits the quotations in said paragraph are taken from a report made to said Auditor for the War Department by a clerk in his office under the title of "Law Board" which report was made by said clerk solely for the advice and assistance of said Auditor in making his report to defendant.

"22. Defendant denies that every prerequisite for the payment of any money to Parish has been complied with.

"Defendant further says that on the 31st day of May, 1904, he decided that under the said Act of Congress of February 17, 1903, there was no balance due to the said Parish, anad therefore declined to pay any money to said Parish.

"23. Further answering said rule to show cause and said petition, this defendant says:

"That after the passage of the said Act of Congress of February 17, 1903, and at the request of said Parish, defendant, as Secretary of the Treasury, took up for consideration the said claim of said Parish; that thereupon defendant requested his said subordinate, the Auditor for the War Department, to examine and settle the said account and to report to defendant his opinion and advice thereon; that the said Auditor examined the said account, and on the 11th day of August, 1903, stated the same as set forth in paragraph 18 of the petition, and on the same day transmitted his certificate of statement to defendant for his action; that on the 12th day of August, 1903, defendant referred said account to his subordinate, the Comptroller of the Treasury for re-examination, and for his opinion and advice thereon; and that said Comptroller re-examined the said claim, and on the 21st day of January, 1904, advised defendant that in his opinion there was nothing due to said Parish under said Act of February 17, 1903, and revised the said account; and that on the 26th day of January, 1904, pursuant to said revision of said Comptroller said Auditor cancelled the certificate theretofore made by him, and certified that there was nothing due said Parish on account of said claim; that defendant also referred the matter to the Solicitor of the Treasury and requested the latter's opinion and advice thereon, and on the 12th day of January, 1904, said Solicitor of the Treasury advised defendant that in his opinion there was nothing due to said Parish under said Act of Congress on account of said claim. That thereafter, and pursuant to the authority and direction of said Act of February 17, 1903, defendant, acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against

the United States for balance alleged to be due him under the contract described in said Act of Congress, and into the evidence in the case collected in the United States Court of Claims, and, after and upon such full and complete examination, and upon full and deliberate consideration thereof, and of the said opinions and advice so theretofore at his request given to him by his said subordinates and the said Solicitor of the Treasury as hereinbefore set forth, and in the exercise of the judgment and discretion conferred upon him by said Act of Congress, did, on the 31st day of May, 1904, determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court in the said case of United States against Behan, and in accordance with the evidence in the case collected by the Court of Claims, and did deduct therefrom all payments which have been made to said Parish, and did determine and ascertain and state that, under the said rule and evidence, no balance is due to said Parish on account of said claim; a copy of said determination of this defendant is hereto attached marked "Exhibit A" and made a part hereof."

As an exhibit to the return is attached the decision of the respondent made May 31, 1904, denying the claim. This decision is embraced in five printed pages of the record, and contains a review of the entire case, and the reasons of the respondent for his conclusion.

The petitioner demurred to the return. On February 13, 1907, the order of the Court recites: "This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibits and affidavit, and the demurrer to said answer; and thereupon the denial of the prayer, the discharge of the rule to show cause, and the dismissal of the petition with costs." From this order the petitioner has appealed.

1. A preliminary question involving the right of the petitioner, as executrix of the will of Joseph W. Parish, to maintain the action under the Act of February 17, 1903, is raised by the first paragraph of the return, in the nature of a demurrer, and must be first considered. The contention is that the statute was passed solely for the relief of Joseph W. Parish, and makes no provision for the succession of his personal representatives. This is true, but, the Act creates or recognizes the right of said Parish to the payment of money, and makes an appropriation therefor. Assuming, for present purposes, that the plain, simple duty was imposed upon the Secretary of the Treasury to make that payment, a right of action accrued to Parish for the enforcement of that duty. For manifest reasons the action of debt or assumpsit would not lie, and the only proceeding left to the party was in mandamus to compel payment. It is the appropriate action at law to recover the money, and is subject to the principles governing such actions. Louis *v.* Brown Township, 109 U. S., 162, 166. As there is no apparent reason why the right should be limited to Joseph W. Parish solely, and there is nothing in the Act expressly negativing its succession in case of his death, we are of

the opinion that the right to enforce the demand, if it can be enforced at all, survived, and passed to his personal representative.

2. The contention of the petitioner that the statement of the claim made by the Auditor of the War Department, an officer subject to the direction of the Secretary of the Treasury, and the ascertainment of the balance due Parish by him, were binding upon the Secretary, and left nothing for him to do but issue the draft for the amount as found, is untenable. The duty of adjusting the claim, of whatsoever nature that duty may be, as well as of making the payment of the amount awarded, was imposed by the statute, in express terms, upon the Secretary of the Treasury, and upon no one else. The Act is quite different from that under consideration in Kendall *v.* U. S., 12 Pet., 522, 610. By that statute, the duty of adjusting the account and ascertaining the credit due the claimant was devolved expressly upon the Solicitor of the Treasury. When adjusted by him, the single duty of carrying the ascertained sum to the credit of the party was imposed upon the Postmaster General. He was vested with no discretion or control over the decision of the Solicitor, and with no right of review thereof. While the Secretary of the Treasury might, probably, have delegated the duty of stating the claim to Parish, in the first instance, to the Auditor or any other skilled employee of his department; and might have approved and adopted the report and made it his own decision under the Act, he was not bound to do so. Moreover, his return shows that he did not adopt the report of the Auditor, and that that officer revised his views and made another statement to the effect that nothing was due the claimant. The return further shows that the Secretary, in person, took the entire matter under consideration, as required by the Act, and made a decision to the effect that nothing was due.

3. The substantial question in this case is the effect to be given to the Act of February 17, 1903. If it imposes a plain ministerial duty upon the Secretary of the Treasury, then the performance of the duty may be compelled. As has been said by the Supreme Court of the United States: "If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." Roberts *v.* U. S., 176 U. S., 221, 231.

On the other hand, if it does not impose upon him the plain duty of ascertaining a balance due Parish by a mere computation, on plain lines laid down for his guidance, but requires him to ascertain facts and makes an application thereto of a prescribed measure of damages; in other words, if it requires the exercise of any discretion on his part in reaching a conclusion, then it is beyond the power of the courts to control the exercise of that discretion. Riverside Oil Co. *v.* Hitchcock, 190 U. S., 316, 324. And in such a case, the question is not whether he has made a correct decision, but whether he has decided at all. It is not for the courts to determine whether he has decided wrongly. U. S. *ex rel.* West *v.* Hitchcock, 26 App. D. C., 290, 295; S. C. Sup. St. U. S., March 4, 1907. Tested by these prin-

ciples, we think there was no error in denying the petition. If it be true, as contended for their report, that the Committees of Congress regarded the claim as an entirely just one for the entire amount of the contract price, and considered that all that was necessary to ascertain the exact amount was a simple calculation, of which any ordinary person is capable, that intention could have been readily and plainly expressed. As an expression of such an intention, the language of the Act was, to say the least, unfortunately chosen. That it is ambiguous is well demonstrated by the radically different views of its meaning taken by the claimant, and by the Secretary, whose perfect good faith must be presumed. The Act, after reciting the substance of the contract, provides, "that the Secretary shall determine and ascertain the full amount which should have been paid to J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto." * * * Had it stopped there, the meaning contended for would be plain enough. But as the contract had not been "carried out in full without change or default made by either of the parties thereto," it was deemed necessary to determine the claimant's damages, by reason of the fact that the contract had not been carried out through the change and default of the representatives of the United States, charged with its execution. Consequently, the Act proceeded to recite in the same sentence, with the interposition of a comma: "under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of United States *v.* Behan (one hundred and tenth United States Reports, three hundred and thirty-eight), and *in accordance with the evidence in the case collected by the United States Court of Claims*, and after *determining the full amount thus due* said J. W. Parish & Company, *under the said contract and rule of law aforesaid*, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court or direct appropriations by Congress, or otherwise, *stating what balance, if any, is due under the rule and evidence prescribed herein*, and pay the said balance to said Joseph W. Parish, the present owner of said claim"; sufficient money being also appropriated for the purpose. The rule for the measure of damages is thus declared in the case designated (U. S. *v.* Behan, 160 U. S., at p. 344): "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *v.* Mayor of Brooklyn, 7 Hill, 69, they are 'the

direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense."

Having prescribed this as the applicable rule, the next direction was to apply it, not to the facts recited in the report or to the findings of fact by the Court of Claims, but "to the evidence in the case collected by the United States Court of Claims." What this evidence was as a whole we are not advised. The Secretary says of it in his decision: "The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters." His general conclusion from the whole of it is that it does not show that Parish was ready to deliver, and could have made delivery of the whole of the ice if the suspension of the contract had been recalled; and that the payments heretofore made to him exceed the loss which he actually sustained. He was commanded to consider the evidence, to apply the rule of law to it, and to render a decision. This involved the exercise of some discretion; and whether or not he erred in his decision, is a matter which the Courts have no right to determine. They are vested with no power of review.

It follows that the judgment must be affirmed with costs; and it is so ordered.

Affirmed.

TUESDAY, *June 4th*, A. D. 1907.

No. 1771, April Term, 1907.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

June 4, 1907.

MONDAY, *June 10th, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

On motion of Mr. Leigh Robinson, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars. And it is further ordered that the mandate in said cause be stayed until further order of Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you between The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, appellant, and George Bruce Cortelyou, Secretary of the United States Treasury, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, in the year of our Lord one thousand nine hundred and seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

____ ____,

_____.

(Bond on Writ of Error.)

Know all Men by these Presents, That we, Emily E. Parish, Executrix, as principal, and Grant Parish, as surety, are held and firmly bound unto George B. Cortelyou, Secretary of the United States Treasury in the full and just sum of three hundred dollars ($300.00) to be paid to the said George B. Cortelyou, Secretary of the United States Treasury his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the United States, *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, appellant, *vs.* George B. Cortelyou, Secretary of the United States Treasury, a judgment was rendered against the said Emily E. Parish, Executrix, and the said Emily E. Parish, Executrix, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George B. Cortelyou, Secretary of the United States Treasury citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Emily E. Parish, Executrix of Joseph W. Parish, deceased, shall prosecute said writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

EMILY E. PARISH. [SEAL.]
GRANT PARISH. [SEAL.]

Sealed and delivered in the presence of—
MONCURE BURKE.

O. K.—D. W. B.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1771. The U. S. *ex rel.* Emily E. Parish, Executrix, &c., Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Bond for costs on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jun 12, 1907. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To George Bruce Cortelyou, Secretary of the United States Treasury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of June, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
DANIEL W. BAKER,
Att'y for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-12 1907 Henry W. Hodges, Clerk.

Assignment of Errors on Appeal to the Supreme Court of the United States.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

v.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

Writ of Error to the Supreme Court of the United States from decree of June 4th, 1907, passed by the Court of Appeals of the District of Columbia, in appeal cause number 1771 in said Court of Appeals.

And now comes Emily E. Parish, Executrix, as plaintiff in error to the Supreme Court of the United States, from the decree of the Court of Appeals of the District of Columbia, passed and entered on the 4th day of June 1907, in said appeal cause numbered 1771, in said Court of Appeals, and makes this her assignment of errors, and says that in the record and proceedings in the above entitled matter, there is manifest error in this to wit.

The Court of Appeals erred:

(1) In denying the prayers of the petition.

(2) In holding that the return was sufficient.

(3) In not deciding that the duty imposed on the Secretary of the Treasury was a ministerial duty.

(4) In not deciding that the admissions made by the Secretary of the Treasury, in the return were of themselves sufficient to cause the writ of mandamus to issue.

(5) In not deciding, that in the present case, the unofficial duties imposed by special act upon the Secretary of the Treasury could not be treated, as if the same were the usual and ordinary duties of his office, but being unofficial duties, on which individual rights depended were subject to review, as if imposed on a private individual.

(6) In holding, that the Secretary of the Treasury had discretion given him to decide (forty-two years after the event) that Parish could not have delivered the ice if called upon to do so, notwithstanding the fact that the 9th finding of the Court of Claims explicitly stated "The said Parish was prepared and willing to deliver the said 30000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25th, 1863, of which the defendants had notice, but they would not nor did not receive more than the 12,768 tons aforesaid."

(7) In holding that the Secretary of the Treasury was not called upon to apply the rule given him to the findings of fact of the Court of Claims, notwithstanding the Committees of the Senate and the House, make the 9th finding of said Court, the basis of the bill they reported, which by the unanimous vote of the two houses, became, when approved by the President, the act of February 17, 1903.

(8) In not deciding that the reports of the Committees which reported the bill were a proper source of reference, in ascertaining the meaning of the act, into which the bill reported by them ripened.

(9) In failing to decide that the act of February 17, 1903 gave a rule for the determination of relief, which the Secretary of the Treasury did not follow.

(10) In not sustaining the demurrer to the return.

(11) In holding that there had been given to the Secretary of the Treasury discretion to determine that the payments theretofore made to Parish by the allowance of the Court of Claims, and the mandate of the Senate and the House, pursuant to the judgment of this Court in 100 U. S. 500 were excessive payments; and, in consequence of such determination, a discretion to deduct whatever he might choose to consider the excess thereof from the balance which would otherwise be payable to claimant. The said Court erred in so holding in the absence of any showing by the Secretary as to the amount of such excess; or any showing as to how he would, or could, or should arrive at it, with a certainty which would authorize him to annul the judgment of this Court, and the legislation of Congress, twenty years after said judgment and enactment had been satisfied; and when no power existed in this country to legally take from Parish, what Congress and the courts had given him by former adjudication and legislation. The said Court erred in so holding, notwithstanding the fact that the Secretary of the Treasury is by the act of February 17th, 1903, directed "to deduct therefrom (*i. e.* from the contract price) all payments, which have been made to said J. W. Parish & Co. or to said J. W. Parish, whether in pursuance of judgments of the Court, or direct appropriation by Congress, or otherwise"; and neither expressly, nor by implication,

invested with the power to find anything less than the whole of said payments to be proper payments, or any part thereof to be excessive, and as such to be charged in diminution of any balance, which would otherwise exist in claimant's favor.

(12) In holding, in effect, that the act of February 17th, 1903, undertook to give to the Secretary of the Treasury, a discretion to revise, correct and defy the judgment of this Court in 100 U. S. 500, and the legislative judgment pursuant thereto; and further to set aside, and for nothing hold the explicit directions of the very act under which said Secretary avowedly was acting.

(13) In not finding that the Secretary of the Treasury had ascertained the balance due to Parish, as required by the act of February 17th, 1903, but had failed to further perform the requirement of said act, by paying over to Parish the balance so ascertained. The act directed the Secretary "to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him," by virtue of a contract made by J. W. Parish & Company with Henry Johnson, a Medical Storekeeper, acting on behalf of the United States; that the Secretary *shall determine and ascertain the full amount* which should have been paid to J. W. Parish & Company if the said contract had been carried out in full, without change or default by either of the parties thereto, under the rules of measure of damages laid down by the Supreme Court in U. S. *v.* Behan 110 U. S. 338; and in accordance with the evidence in the case collected by the U. S. Court of Claims, and after determining the full amount thus due said J. W. Parish and Company under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein and pay the said balance to said Joseph W. Parish.

This requirement had been fulfilled by the Auditor of the War Department, at the direction of the Secretary, as shown by the following statement of account

5000 tons of ice at St. Louis, Mo.	$16.00 per ton....		$80,000.
" " " " " Cairo, Ill.	$20.00 " "		100,000.
10000 " " " " " Memphis, Tenn.	$20.00 " "		200,000.
10000 " " " " " Nashville	$25.00 " "		250,000.
			$630,000.
From which deduct payment by			
Medical department $129,738.33 (erroneously printed in record).....		$129,783.33	
Settlement by 2d Comptroller's office..		171,072.69	
Award by Court of Claims.....		10,444.91	
Amount saved by non-delivered ice...		137,385.12	
		448,641.05	
Leaving balance due.....			$181,358.95

The Secretary states, that this balance, "is the amount conceded to be due, if anything is due," although there is no suggestion that there is error in this computation to the fraction of a cent, the Secretary ignored the balance so incontestibly due, (and which he was unable to correct), because of a supposed power in himself to disregard prior judgments, and in contravention of them, & of the express language of the act of February 17th, 1903, to decide that Parish could not have transported the ice, if called upon to do so, and therefore was not so much as entitled to the cost to which he had been put, and much less to the contract price he would have received on delivery. Such rejection of the claim, when fully proved, was the same thing as a refusal to act.

HOLMES CONRAD,
LEIGH ROBINSON,
Of Counsel for Emily E. Parish,
Executrix, Plaintiff in Error.

(Indorsed:) No. 1771. The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Assignment of errors. Court of Appeals, District of Columbia. Filed Jun 18, 1907. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 64, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury No. 1771, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 19th day of June A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,768. District of Columbia Court of Appeals. Term No. 111. The United States *ex rel.* Emily E. Parish, executrix of Joseph W. Parish, deceased, plaintiff in error, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Filed June 21, 1907. File No. 20,768.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE TREASURY, *January* 21, 1904.

Account of Joseph W. Parish, Claim under Act of February 17, 1903, (32 Statutes 1612) Settled by the Auditor for the War Department, per certificate No. 23729, dated August 11th, 1903.

Upon a revision, on the Comptroller's motion, of the above named account, upon the application filed August 12, 1903, of the Secretary of the Treasury for re-examination, I certify the following differences found by me.

I find, and certify a debit difference of $180,358.95, as per decision of even date herewith, the purpose of this certificate being to eliminate the balance certified by the Auditor, and leave the case open for such action by the Secretary of the Treasury, under the said Act of February 17, 1903, as he may deem proper.

R. J. TRACEWELL,
Comptroller.

I recommend that the paper of which the foregoing is a copy, be, by consent of parties, printed and filed as a supplement to the record of Parish *v.* United States.

Amount is $181,358.95.

Signed by R. J. Tracewell instead of *P.* Tracewell.

[On the back.]

It is stipulated that the within paper may be printed and added to the record of the case of Parish *v.* Secretary of the Treasury, to have the same effect as though certified as part of the transcript already printed and filed.

CHARLES J. BONAPARTE,
Attorney General.

HOLMES CONRAD,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 111.

THE UNITED STATES EX REL. EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED,

v.

GEORGE BRUCE CORTELYOU, SECRETARY OF THE UNITED STATES TREASURY.

BRIEF IN BEHALF OF APPELLANT.

Statement.

By virtue of a decree of the Supreme Court of the District of Columbia, on the 7th day of April, A. D. 1905, the appellant duly qualified as executrix of the last will and testament of her father, Joseph W. Parish, deceased, the original claimant of the sum in controversy (Rec., pp. 2 and 15). The retirement of Leslie M. Shaw, the original defendant herein, and the appointment of George B. Cortelyou to be his successor, as Secretary of the Treasury, having been suggested, it was by the court ordered that the said George B. Cortelyou, Secretary of the U. S. Treasury, be made the party appellee in this cause (*id.*, 42).

At the outset the following corrections should be made in the record:

On page 2, 18 lines from the top, the words and figures "at St. Louis, $15.00," should be "at St. Louis, $16.00," as shown by the contract (page 16).

On page 12 the words and figures "5,000 tons of ice at St. Louis, Mo., at $5 per ton, $80,000," should be "5,000 tons of ice at St. Louis, Mo., $16.00 per ton, $80,000."

On the same page, 7 lines from the top, the figures $129,783.33" should be "$129,738.33."

On March 5, 1863, Henry Johnson, medical storekeeper, United States Army, for and on behalf of the United States, and Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., "*for themselves, their heirs, executors, and administrators,*" mutually covenanted and agreed to and with each other for the delivery by said Parish & Co. at Memphis, Nashville, St. Louis, and Cairo of "the whole amount of ice required to be consumed at each respective point during the remainder of the year 1863."

Rates of Payment.

For each ton delivered at Nashville	$25.00
For each ton delivered at St. Louis	16.00
For each ton delivered at Cairo	20.00
For each ton delivered at Memphis	20.00

(Record, p. 16.)

On March 25, 1863, by instruction of Assistant Surgeon General Wood, the following was issued:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, *March* 25, 1863.

"Messrs. J. W. PARISH & Co.

"GENTLEMEN: I am instructed by the Assistant Surgeon General to direct, *that the ice which you have agreed to deliver at the points designated in your contract* shall be distributed in the following quantities, viz:

"At St. Louis	5,000 tons.
"At Cairo	5,000 tons.
"At Memphis	10,000 tons.
"At Nashville	10,000 tons.

"Making *the total of 30,000 which you have contracted to deliver*. The ice to be delivered at Nashville and Memphis is for use of the sick of the armies in the field, and should be furnished *without delay*.

"Very respectfully, your ob't servant,

"By order of the Assistant Surgeon General:

"JOSEPH B. BROWN,
"Surgeon United States Army."

(*Id.*, 2.)

On March 31, 1863, from the same office was sent this order:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, *March* 31, 1863.

"To J. W. PARISH & Co. (care of C. H. WICKER & Co.), *Chicago, Ill.:*

"I am instructed by the Surgeon General to *suspend* the order I have given you till further instructions are given from him.

"R. C. WOOD,
"Assistant Surgeon General."

The dispatch itself did not reach Parish & Co., but Parish received oral notice of it on April 2. Prior to the notice thus received Parish had delivered 12,768 tons of ice at points named in the contract, and had received therefor the contract price (*id.* 3). To this extent the agreement had been executed. In one week Parish had performed more than one-third of the obligation assumed by him, and had prepared himself to fully execute that remaining to be performed. But the right to recover anything on the last-mentioned account having been disputed, Parish, by virtue of an act of Congress approved May 31, 1872, was empowered to bring suit therefor in the Court of Claims.

Among other findings by the Court of Claims are the following:

FINDING VI.

"Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in Finding V, the

said Parish had purchased for delivery, under the contract sued on, 8100 tons of ice; and after delivery of said letter to him, he set about purchasing ice for delivery, in pursuance of said letter, and thereafter, and before he was on the 2d day of April, 1863, apprised of the aforesaid order of Surgeon General Hammond of March 31, he had purchased, or contracted for the purchase of, 23,000 tons of ice."

FINDING IX.

"The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not, nor did, receive more than the 12,768 tons aforesaid."

FINDING XI.

"The notice of 25th of March, 1863, to the claimants from the Assistant Surgeon General's office at St. Louis, set out in Finding V, and which was suspended by order of the Surgeon General, *remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863*" (*id.*, 3-4).

The record shows the statement of a Government official (*id.*, 2 & 3), that the meltage of the ice furnished by Parish was only about half that of ice furnished by other contractors. The answer admits the statement by the official (*id.*, 29).

Very soon after the contract of March 5, 1863, was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish (*id.*, 18).

The claim made by Parish in the Court of Claims was for the contract price of the ice purchased by him to enable him to discharge his contract, and lost to him by reason of the suspending order of March 31. From the contract price was to be deducted the cost of transportation, not incurred upon the undelivered ice. A majority of the court, speak-

ing through Drake, C. J., held: "The letter of Assistant Surgeon General Wood was no part of the contract, and as the claimant's case rests upon that, their petition must be dismissed" (12 Court of Claims, 620).

In the dissenting opinion of Nott, J., it is said:

"If the Assistant Surgeon General had no authority to order the claimant to deliver this ice *without delay*, as he did, the Surgeon General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so as to keep it in suspense, and at the same time declare that it never had vitality. * * * *That this ice proved a total loss to the contractor, and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial.* * * * *The order to deliver caused him to purchase it; the suspension of the order occasioned its loss*" (*id.*, 622-4).

On appeal, this court reversed the opinion of the court delivered by Drake, C. J., that "the letter of Assistant Surgeon General Wood was no part of the contract"; holding emphatically that it was.

Miller, J., speaking for this court, said:

"The order of the 25th of March, made within 20 days after the contract was signed, was an unequivocal demand, *under that instrument*, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. * * * They were, therefore, under an imperative necessity to prepare to fulfill this requirement."

This court did also adjudge that "to hold the Government to the contract price for all those amounts, they (Parish & Co.) should have delivered, or tendered, or offered to deliver, and demanded payment." But it was added: "As the Government left the demand suspended, so that *while claimants were compelled to purchase under the original orders, and could not safely dispose of it (the ice) while it remained unrevoked*, they are entitled to recover what they paid for the ice which was lost, and what expense they were at in making

the purchase, and in keeping it until it was lost" (*Parish v. U. S.*, 100 *U. S.*, 504-6).

In response to the mandate of this court, the Court of Claims held that it could not reopen the case for additional evidence, but on that before it made a further award of $10,444 91/100.

The claimant therefore applied to Congress for the relief to which this court had adjudged him to be entitled. His claim was referred by the House committee to the War Department for report. The Surgeon General found that the whole amount of undelivered ice, viz., 17,232 tons, was lost to said Parish, and ascertained the cost thereof (Rec., p. 6). On the coming in of this report, by act of Congress of February 20, 1886, it was enacted.

"That the Secretary of the Treasury be and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him *in the purchase of 17,232 tons of ice* for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were *wholly lost to said Parish*" (24 Stat., 653-4).

By this legislative judgment it was finally determined twenty-two years ago, that 17,232 tons of ice (in addition to what had been delivered) had been "wholly lost to said Parish," owing to no fault of his own, but solely by reason of the suspending order. Thereby was conclusively settled between the Government and Parish any ground of defence which could have been brought forward to reduce the sum appropriated in payment therefor, if such existed and had not been brought forward. It was determined that no adequate defence existed to the payment, or any part of the payment, directed to be made. Any inability on the part of Parish to deliver the ice, had he been called upon to do so; any unskilfulness or culpability which might have been

urged against him and was not, is now concluded by the terms of this act; in effect, the satisfaction entered of the final judgment of this court.

As was said by Nott, J., in the Court of Claims:

"The order to deliver caused him to purchase it (the ice); the suspension of the order occasioned its loss" (*id.*, 4).

The power does not exist to reopen what was thus settled first by this court, and afterwards by Congress.

After the time of this act of 1886, committees, both of the Senate and the House, were convinced that at least the equivalent of tender had existed. This court had said: "that as the claimants neither delivered nor offered to deliver the remainder, they cannot recover either the contract price or the profits they might have made if they had done so." If, therefore, this single objection had been removed, by the logic of that decision, Parish & Co. would have been adjudged entitled to "recover either the contract price or the profits they might have made if they had done so."

The committees were of opinion that under the facts disclosed by the record, there was enough to satisfy an equitable construction of the law of tender. They accordingly passed an act, the plain purpose of which was to place Parish in the position he would have occupied had the contract been completed—that is, to give him the same benefits he would have received had he delivered every pound of the 30,000 tons of ice and been paid the contract price therefor. This is the object, intent, and effect of the act. Congress, in effect, directs that the contract be treated as completed, and the question of tender be treated as if a tender had been made in fact. It is immaterial whether this is or is not the affirmance of a correct rule of law. It is the rule laid down by Congress for the case in the hands of the respondent. Finding IX states that Parish "was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract, * * * of which the de-

fendants had notice." This was fortified by the deposition of Robert T. Cramer, acting medical purveyor and disbursing officer in the Medical Department of the Army, who saw Parish in St. Louis the week following the 25th of March. Parish then said: "I have made all my contracts to furnish the 30,000;" and "he wanted me, if I was in communication with my associates, *to urge upon them the importance of securing it as soon as possible;*" he said "that he was prepared to furnish the whole apportionment, 30,000 tons." The testimony of said witness is not contradicted nor impeached (Rec., p. 9). Since then, as the petition shows, the Law Board of the Auditor's Office have given their sanction to the conclusion that Parish *"tendered the whole 30,000 tons"* (*id.*, 13). By the terms of an act of February 17, 1903, the Government intended to estop itself from raising or taking any advantage of any question of failure of tender or offer to deliver, if such existed; and, in addition to the estoppel already existing by reason of the act of February 20, 1886, and also by the judgment of this court, to estop itself once more as to any question of ability to deliver the ice, which in point of fact had not been delivered. The question of tender has been waived or the lack of tender cured by the following act:

"That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish & Company with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which contract bears date March 5th, 1863, and provides that said J. W. Parish & Company should furnish to the United States, for the use of the Medical Department of the Army, the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full, without change or

default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (110 U. S., 338) and in accordance with the evidence of the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish & Co. under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Co. or to said Joseph W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated" (Rec., p. 17).

32 Stat., 1612.

The statement, which the Secretary was authorized and *directed* to make, was by him referred to the proper officer, viz., to the Auditor for the War Department. This officer stated the account as follows:

5,000 tons of ice at St. Louis, Mo., $16.00 per ton		$80,000.00
5,000 tons of ice at Cairo, Ill., $20.00 per ton		100,000.00
10,000 tons of ice at Memphis, Tenn., $20.00 per ton		200,000.00
10,000 tons of ice at Nashville, Tenn., $25.00 per ton		250,000.00
		$630,000.00
From which deduct		
Payment by Medical Department	$129,738.33	
Settlements by Second Comptroller's Office	171,072.69	
Award by Court of Claims	10,444.91	
Amount saved by non-delivered ice	137,385.12	
		448,641.05
Leaving balance due		$181,358.95

Rec., p. 12.

The act directs that the contract shall be treated as completed, not only as if it could have been performed, but as if it had been performed; as if "*the said contract had been carried out in full, without change or default, made by either of the parties thereto.*"

The Secretary is directed to ascertain what would have been the full amount coming to Parish upon such completion of the contract under the rule laid down in the Behan case, and this rule directs the matter to be ascertained to be "*the difference between the cost of doing the work and what he was to receive for it*" (110 U. S., 345). "What he was to receive" was fixed by the contract. With a single exception, "the cost of doing the work" had also been fixed by payments in the nature of satisfied judgments. The single exception was what would have been paid for the transportation of the undelivered ice. This part of "the cost of doing the work," *and this part only*, was to be determined "in accordance with the evidence in the case collected by the United States Court of Claims." The act directs the Secretary (and the direction is mandatory) "*after determining the full amount thus due said J. W. Parish & Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress*, or otherwise." The balance resulting from this deduction (not from any other deduction) was to be paid to Parish, and was by the act expressly appropriated. What the Secretary was directed to ascertain and determine was "the claim of Joseph W. Parish against the United States for *balance*." His examination was limited to this. The word "balance" imports that some payments have been made. To ascertain it, therefore, the aggregate amount due under the contract and the payments made must be known.

The sixteenth paragraph of the petition alleges that "the evidence in the case collected by the United States Court of Claims" gives the exact rates for the transportation of ice,

during the spring and summer of 1863, from Lake Pepin to St. Louis, Cairo, Nashville, and Memphis. It is alleged that this testimony *"received no word of contradiction," and "therefore was conclusively established"* (*id.*, 10).

This showed the rates of transportation of ice during the spring of 1863, by barges:

From Lake Pepin to St. Louis.....	$5.00 per ton
From Lake Pepin to Cairo.....	6.00 per ton
From Lake Pepin to Nashville.....	9.00 per ton
From Cairo to Memphis.....	2.00 per ton

The answer does not deny that this evidence was given; and it does not deny that it was uncontradicted evidence (*id.*, 30). This was therefore *"the evidence in the case collected by the United States Court of Claims,"* upon the only point the Secretary was directed to examine.

This was uncontradicted, and therefore conclusively established proof. The whole case submitted by the reference is stated, in language too clear for cavil by the Law Board of the Auditor's office (in paragraph 19 of the petition):

"Said committees of Congress were evidently satisfied with the evidence as to Mr. Parish's ability to have fulfilled his contract and as to the loss of the ice. * * * This statement is evidenced by the fact that Congress passed the Act of February 17, 1903, directing the Secretary of the Treasury to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., *if the said contract had been carried out in full, without change or default made by either of the parties thereto; in other words, as if Parish had delivered the whole amount of ice contracted for, and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice.* * * * If the evidence in the case collected by the Court of Claims should be examined to ascertain from that source, first, whether or not the contractor had purchased sufficient ice to meet his obligations under his contract; second, whether or not the ice left on his hands had, *in consequence of the refusal to receive it, been lost to him*, it would be found that all these points had been fairly well sustained in the

affirmative by the testimony. * * * That the Court of Claims was justified in making its ninth finding of fact to the effect *that Mr. Parish was prepared* and willing to deliver the 30,000 tons of ice contracted for, in conformity with the conditions of the letter of March 25, 1863, and *that he tendered the whole 30,000 tons*, but that the Government would and did not receive more than 12,768 tons. * * * That under the Act of February 17, 1903, *there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice.*"

Further:

"That the sufficiency *of the evidence to prove the purchase of a single pound of the undelivered ice, between the 25th of March, 1863, and the 2d day of April, 1863, by Joseph W. Parish & Co., or the loss of the same after the 31st of March, 1863, is immaterial* in view of the provisions of the Act of February 17, 1903."

Hence it followed "that after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case *presents simply a mathematical proposition*, under the rule laid down for the measure of damages in the Behan case" (*id.*, 12-13).

Realizing that nothing remained to be performed of the duty confided to him, the Auditor, on August 11th, 1900, wrote:

"To JOSEPH W. PARISH, care of attorney, J. H. MCGOWAN, *Washington, D. C.:*

"The claim filed by you for amount found due under act of Congress, approved Feb. 17, 1903 (Private, No. 469), for ice under contract with J. W. Parish & Co. received in this office April 15, 1903, *has been examined and settled*, as shown in the following statement, and settlement certificate No. 23,729, transmitted to the Secretary of the Treasury for payment.

"Amount claimed. Amount disallowed. Amount allowed.
$181,358.95.

"Respectfully, F. E. RITTMAN,
"*Auditor.*

(*Id.*, 28.)

These are the facts alleged in the petition, which, in conclusion, alleges: "The said Secretary positively refused to pay the balance found by the auditor to be due the said Parish or any part thereof," and asks that a rule be laid on the said defendant, requiring him *to show cause why a writ of mandamus should not be granted.* In accordance therewith a rule was laid on the defendant to show cause why the peremptory writ of mandamus should not be granted (*id.*, 40).

It is confidently asserted that there is not a single allegation of fact in the petition material to the issue which the answer denies or tends or pretends to deny. It is, indeed, asserted that the rights accruing under the contract made by Parish & Huse "for themselves, their executors, and administrators" do not pass to the executrix of Parish, which, of course, will be considered. But, with this exception and with the qualification that respondent claims to be under no obligation to consider the findings of the Court of Claims, *"the said act vesting in defendant the right to review said evidence and make such findings as seem right and proper to him,"* the answer admits, in substance, paragraphs (1) to (13) inclusive of the petition; denies claimant's construction of the act of February 17, 1903, in paragraph (14); denies the claimant's conclusions from the admitted facts stated in paragraphs (15) to (20), inclusive, and denies the legal conclusions stated in paragraphs (20) and (21) of the petition.

The answer admits the quotations from the report of the Law Board, but alleges that on the 26th day of January, 1904, the said auditor "revised his said statement and found that nothing was due." It is further said that respondent, on August 12, 1903, referred said account to the Comptroller of the Treasury, and on the 21st of January, 1904, said Comptroller advised defendant "that in his opinion nothing was due to said Parish under said act of February 17, 1903, and revised said account, and that on the 26th day of Janu-

ary, 1904, *pursuant to said revision of said Comptroller*, said auditor cancelled the certificate theretofore made by him" (*id.*, 31). The Solicitor of the Treasury advised to the same effect (*id.*) The convincing reasons supplied by these officials are not given. We are left to infer that it was exclusively "*pursuant to said revision of said Comptroller* said auditor cancelled the certificate theretofore made by him," thus making a *tabula rasa* of his own arithmetic.

The reasons of the respondent's determinations, as stated in the answer, are given in a paper filed as "Exhibit A" thereto. It may be this paper gives the reasons supplied by the two officials on whom reliance was placed. These reasons will receive a careful consideration.

The cause coming on to be heard in the trial court upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibit, and affidavit, and the demurrer to said answer, the prayers of said petition were denied and the rule to show cause discharged (*id.*, 40). On appeal to the Court of Appeals of the District said judgment was affirmed (*id.*, 42-50). To correct the error of the court last mentioned the present writ of error to remove the cause to this court issued (*id.*, 51-53).

Assignments of Error.

The Court of Appeals erred:

(1) In not sustaining the demurrer to the return.

(2) In denying the prayers of the petition.

(3) In holding that the return was sufficient.

(4) In sustaining the position of the respondent that the direction to "ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full, without change or default, made by

either of the parties thereto" was, in effect, contradicted by specific instruction in the same sentence to do this under the rule "laid down by the Supreme Court in the case of *United States v. Behan.*"

(5) In sustaining the position that respondent was vested with a paramount power to make new findings for himself in respect to matters in which he was concluded by the findings already made in the Court of Claims, and notwithstanding the fact that the committees of the Senate and the House make the 9th finding by said court the basis of the bill, which by the unanimous voice of both Houses became, when approved by the President, the act of February 17, 1903.

(6) In holding that the careful consideration and well-reasoned conclusions of the committees which reported the bill, were not a proper source of enlightenment as to any doubt which might exist respecting the intent of the act into which the bill, so reported, ripened.

(7) In holding that the Secretary of the Treasury had discretion given him (more than forty years after the event) to decide that Parish could not have delivered the ice, if called upon to do so, notwithstanding the 9th finding—"*The said Parish was prepared and willing to deliver the said 30,000 tons of ice, in conformity with the conditions and obligations of this said contract, and the terms of said letter of March 25, 1863.*"

(8) In holding, in effect, that the act of February 17, 1903, gave the Secretary a discretion to correct the judgment of this court in 100 U. S., 500, and the appropriation by Congress pursuant thereto; as well as to set aside and for nothing hold the explicit directions of the very act under which the Secretary avowedly was acting.

(9) In sustaining the position of the respondent, that the profits to be ascertained, by the application of the rule in the Behan case, were remote and speculative in character, "and therefore incapable of that clear and direct proof which the law requires."

(10) In holding that the duty imposed on the respondent was a judicial and not a ministerial duty.

(11) In holding, in effect, that the unofficial duties imposed by special act upon the Secretary, viz., "the plain duty of ascertaining a balance due Parish by mere computation, on plain lines laid down for his guidance," like his official duties, were subject to official (or quasi official) discretion, beyond the power of courts to control.

(12) In holding that the Secretary, after the balance due to Parish under the act, by "mere computation on plain lines laid down for his guidance" had been irrefutably ascertained by his own right hand (the proper accounting officer), was justified in refusing to further perform the requirement of said act, by paying over to Parish the balance, so ascertained; because of a supposed power in the Secretary, in contravention of the express language of the act of February 17, 1903, and of prior legislation and adjudication, to decide that Parish could not have transported the ice, if called upon to do so.

Points and Authorities.

I.

Analysis of the Case.

The record of the case upon which the writ of mandamus is asked discloses the following state of facts in the order of their event:

First. By contract of March 5, 1863, Parish & Company agreed and undertook to deliver "the whole amount of ice required to be consumed at Memphis, Tennessee, Nashville, Tennessee, St. Louis, Missouri, and Cairo, Illinois, during the remainder of the year 1863," the United States agreeing to pay for the ice delivered at Nashville $25 per ton; at St. Louis, $16 per ton; at Cairo, $20 per ton, and at Memphis, $20 per ton (Record, p. 16).

Second. By instructions from the United States, the ice contracted for was to be distributed as follows, viz: At St. Louis, 5,000 tons; at Cairo, 5,000 tons; at Memphis, 10,000 tons, and at Nashville, 10,000 tons (Record, p. 2).

Third. Before the 2d of April, 1863, Parish & Company had delivered, under the contract and instructions, ice in the places and quantities following, viz: At St. Louis, 4,174 tons; at Cairo, 1,388 tons; at Memphis, 6,456 tons, and at Nashville, 750 tons, for which they were paid $242,414 (Record, p. 3).

Fourth. On March 31, 1863, the United States suspended the order and instruction given for the delivery and distribution of the ice, under the contract, by a letter of that date from the Assistant Surgeon General's Office, "till further instructions are given by him," but the notice did not reach Parish until April 2, 1863 (Record, p. 3).

Fifth. On May 30, 1872, Congress, by an act duly approved, directed the Court of Claims to hear and determine the claim, and that court did render a judgment from which an appeal was taken to the Supreme Court of the United States, where the judgment of the Court of Claims was reversed (Parish *v.* U. S., 100 U. S., 500).

Sixth. The case was remanded to the Court of Claims, and that court gave judgment for the sum of $10,444.91, which was duly paid by the United States (16 Court of Claims R., p. 642).

Seventh. Claimant again applied to Congress for relief from the action of the Court of Claims in refusing to hear the testimony tendered by him, and Congress referred the case to the War Department for a report on the facts, and the amount which should, upon those facts, be paid to claimant. The War Department reported that upon the evidence "Parish was entitled to be reimbursed on account of the cost of ice not delivered" the sum of $58,341.85. On February 20, 1886, Congress enacted "That the Secretary of the Treasury be, and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury not otherwise appropriated, the sum of $58,341.85 *being the balance of money laid out and expended by him in the purchase of 12,252 tons of ice, for the use and at the request of the United States, which were not afterward called for or taken by the Government, but were wholly lost to said Parish*" (24 Statutes, 653-4).

Eighth. The three payments so made by the United States to Parish of the said sums of $242,444.00 and $10,444.91 and $58,341.85 were made to reimburse him the amounts he had actually expended in the purchase and transportation of the ice, but they were not made to compensate him for the purchase and delivery of the ice under his contract.

Ninth. Parish then applied to Congress to provide for the compensation to which he was entitled under the terms of his contract with the United States, and Congress passed the act of February 17, 1903, for the purpose of having ascertained and of paying to him the amount of the compensation to which he was entitled (32 St., 1012).

Tenth. The act of February 17, 1903, directed the Secretary of the Treasury "to make full and complete examination into the claim of Joseph W. Parish against the United States for the balance alleged to be due him," and

> "1. determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States v. Behan, 110 U. S., 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and, after determining the full amount thus due said Parish & Co., under said contract, and rule of law aforesaid,
>
> "2. to deduct therefrom all payments which have been made to said J. W. Parish & Co., or to said J. W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress or otherwise, stating what balance, if any, is due under the rule and evidence presented herein, and
>
> "3. pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated."

Eleventh. Under the direction of said act, the Secretary of the Treasury did place in the hands of the Auditor for the War Department, in the Treasury, the said act of Congress, the case of United States *v.* Behan, and all the evidence collected in the Court of Claims, and instruct said Auditor to ascertain what balance, if any, was due to the said Parish under the contract in accordance with the rule of law and evidence so collected.

Twelfth. The said Auditor, in pursuance of the instructions so received, did ascertain such balance, and did report the same, together with the process of calculation by which it was ascertained, to the Secretary of the Treasury, as follows, viz:

5,000 tons of ice at St. Louis, at $16 per ton..		$80,000.00
5,000 tons of ice at Cairo, Ill., at $20 per ton.		100,000.00
10,000 tons of ice at Memphis, at $20 per ton		200,000.00
10,000 tons of ice at Nashville, at $25 per ton		250,000.00
		$630,000.00
Brought forward		$630,000.00
Deduct payment by Medical Department	$129,7[illegible].00	
Settlement by 2d Comptroller office	171,072.69	
Award by Court of Claims....	10,444.91	
Am't saved by non-delivered ice	137,385.12	
		448,641.05
Leaving balance due.....		$181,358.95

Record, p. 12.

Thirteenth. On August 11, 1903, the said Auditor sent to Parish a formal notice that said balance had been allowed (Record, p. 13).

Fourteenth. On June 2, 1906, the Secretary of the Treasury filed his report made under said act of February 17, 1903, in which, after alleging the existence of several matters, the contrary of which had been expressly adjudged by the Supreme Court in Parish *v.* United States, 100 U. S., 500, he concludes his report as follows, viz: "Counsel for claimants now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act*. I reach the conclusion that nothing is due" (Record, p. 37).

The question presented here is, Why, if the amount ascertained by the Auditor is "conceded to be due, if anything, under the act," did the Secretary of the Treasury conclude that nothing was due?

Did the act of Congress clothe the Secretary with power to conclude that nothing was due, if under the rule of damages prescribed by Congress, and under the evidence collected in the Court of Claims, it is mathematically certain that something was due, as was ascertained by the Auditor?

It is undoubtedly true that the United States Government is not bound by the decisions of their accounting officers.

Nutt *v.* United States, 125 U. S., 624.

U. S. *v.* Harman, 117 U. S., 65.

But when the amounts ascertained by such officers are conceded by the head of the department "to be due, if anything, under the act," is anything left but the performance of the duty imposed by Congress?

II.

In performing the duty laid upon him by the act of February 17, 1903, the Secretary of the Treasury was not acting in the exercise of judicial or discretionary but only of ministerial powers.

The "nature of the thing to be done" by him did not admit of the exercise of judgment and discretion.

The Secretary says, in the second paragraph of his return to the alternative writ (Record, p. 31), that he was "acting in his official capacity as Secretary of the Treasury," and, in the same return (page 32), that he was acting "in the exercise of the judgment and discretion conferred upon him by the said act of Congress."

Now, it may be conceded here that if this act of Congress, in its requirements, called for the exercise of judgment and discretion by the Secretary the peremptory writ should not be granted.

By what rule or test may it be determined whether one acting under such powers and duties as this act imposes is acting ministerially or judicially?

In Marbury *v.* Madison, 1 Cranch., p. 70, Marshall, C. J., said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore in law is never presumed to have forbidden, as for example, to record a commission or a patent for

land which has received all the legal solemnities, or to give a copy of such record in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment, that right may be done to an injured individual, than if the services were to be performed by a person not the head of a department."

We are admonished, then, that it is by "the nature of the thing to be done," and not by the office of him to whom the writ is directed, that the right to the writ of mandamus is to be determined. Nor is that right to be determined by the mere forms of expression in which the power or duty is laid: for if Congress should direct the head of a department, "in the exercise of judgment and discretion," to add up a column of figures and report the sum, the language employed in the act could not be construed as conferring a power or duty which was manifestly repugnant to "the nature of the thing to be done."

In Kendall *v.* United States, 12 Peters, 524, Mr. Justice Thompson, delivering the opinion of the court, said:

"There are certain political duties imposed upon many officers in the executive departments, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution, and in such cases the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President, and this is emphatically the case where the duty imposed is of a mere ministerial character."

In United States *v.* Black, 128 U. S., 48, this court said:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in any case at all, or when by special statute, or otherwise, a mere minis-

terial duty is imposed upon them, that is a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

In the present case does the act of Congress clothe the Secretary with that "judgment and discretion" which cannot be reviewed by the courts, and in the exercise of which he may, if he will, reject or ignore conclusions which are mathematically demonstrable?

Judge Cooley, on page 515 of his work on Taxation, says of the writ of mandamus:

"It will not only lie, therefore, to compel an auditing board to proceed to the consideration of an account, and to pass upon it in some manner, but if the charges are legal, and it is the clear duty of the board, under the statute to make the allowance, that duty the members may be compelled to perform by means of this writ."

And among many cases cited in the notes in support of this there is cited the case of *People v. Supervisors of Otsego*, 51 N. Y., 401, which is strikingly apposite here. The court said:

"They (the supervisors) are to determine the facts as to any disputed claim, and, if it is unliquidated, they are to determine the amount to be paid. But the law is supposed to be plain, and they are presumed to understand it, and they have no right to reject a claim as illegal, which the law plainly requires them to allow. If they do they can be compelled to the allowance by mandamus."

There are many and important duties laid upon the head of an executive department of the Government which pertain to the office itself and cannot properly be discharged by any other department. Such are the duties which the head of the department performs, as Mr. Shaw says "in his official capacity as Secretary of the Treasury." The performance of such duties is confided to the judgment and discretion of the Secretary. But

there is also a large class of cases in which the Government or the public have no direct concern, to which Judge Marshall referred as cases "affecting the absolute rights of individuals in the performance of which he (the Secretary) is not placed under the particular direction of the President," and which are also referred to in the case of Butterworth *v.* Hoe, 112 U. S., 57, where it is said:

"It is a maxim of the law, admitting of few, if any exceptions, that every duty laid upon a public officer, for the benefit of a private person, is enforceable by judicial process."

In such cases the officer is not performing "official duties," is not acting in an "official capacity," but is discharging only such duties as might with equal propriety have been laid by Congress upon any other official or employee in the service of the Government.

This court has, in many cases strikingly like the case at bar in its distinguishing characteristics, held that heads of departments, as well as other high officials of the Government, when called on by Congress to ascertain balances or determine the amounts due by the Government on claims, were not acting judicially or in the exercise of discretion, but were in all such cases acting only ministerially, and that their findings did not at all bind the Government.

III.

The Court of Appeals, in support of the position that the act of February 17, 1903, vested the respondent with a discretion, the exercise of which the courts cannot control, refer to the case of *Riverside Oil Company v. Hitchcock,* 190 U. S., 316. The opinion in this case rests upon the same ground with that in *United States v. Black,* 128 U. S., 40. The syllabus is, "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, *a special tribunal with judicial functions* to which

is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands, and neither an injunction nor mandamus will lie against an officer of the Land Department to control him *in discharging an official duty* which requires the exercise of his judgment and discretion."

There the mandamus was to compel the Secretary of the Interior to vacate an order rejecting selections of land. The defendant answered that an allegation showing the land selected to be non-mineral in character and unoccupied was an essential averment; that no evidence as to non-occupancy was given; that the affidavit as to the character of the lands was made "upon the evidence found upon the surface of the ground and that the affiant does not undertake to express any opinion as to what may be under the ground;" that in the exercise of his proper duty and function as Secretary of the Interior, the defendant decided that, by reason of the failure of Clarke to show in due and proper form that the lands were at the date of selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected." This court held:

"The *official duties* of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. * * * The court has no general supervisory power over the officers of the Land Department, by which to control their jurisdiction. * * * Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter *which the law gave him the power and imposed upon him the duty to decide for himself*" (190 U. S., 324-325).

The doctrine laid down in *Martin v. Mott*, 12 Wheat., 31, that "whenever a statute gives a discretionary power to any to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts," is not controverted.

But not one word of these opinions militates against, or was intended to erase, one iota of the memorable language in *Marbury v. Madison:*

*"But when the legislature proceeds to impose on that officer (i. e., executive officer) other duties, when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent upon the performance of those acts; he is so far an officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others. * * * Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured has a right to resort to the laws of his country for a remedy"* (1 Cranch., 165, 166, 170, 171).

In *Kendall v. United States*, the court said:

"It has been considered by the counsel on the part of the Postmaster General, that this is a proceeding against him to enforce the performance of an official duty. * * * The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act. * * * This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act" (12 Pet., 609-614).

There is nothing in the act of February 17, 1903, which makes the Secretary *"the sole and exclusive judge of the existence of the facts"* he is directed to ascertain.

In the case at bar, the balance directed to be ascertained has been ascertained. The said balance is produced by strict adherence to the act. That which Congress directed

to be done has been done. The literal compliance with the words of the act is not controverted. On the contrary it is conceded to be correct. The record shows to the court the process by which was reached the balance of $181,358.95, "which is the amount conceded to be due, if anything, under the act." The court has before it the complete ascertainment of that which Congress directed to be ascertained. By a simple act of perception the court can see that everything Congress directed to be done in the way of ascertaining "the said balance" is shown by the record to have been done. The proof before the court is as perfect, as if the Secretary in his return, had produced an account identical with that of the auditor, and then added:

"While this is the undoubted arithmetical result, I decline to 'pay the said balance to said Joseph W. Parish,' the only thing remaining to be done; because I cannot give my assent to the basis upon which rests former judicial action and legislative appropriation.' What remains to be done is as 'purely ministerial' as in the Kendall case. No more in this case than in that. Can the respondent's refusal to act be justified by *'a legal right to do it or not to do it according to his will.'*"

The respondent says that he, *acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged,* * * * and in the exercise of the *judgment and discretion* conferred upon him by said act of Congress did on the 31st of May, 1904, determine, &c." (*id.*, 31-32).

The question before the court would be one of far-reaching consequence, had it not already been decided. Can an executive officer of the Government, by merely saying: "I am acting in my official capacity," change "the nature of the thing to be done" in the execution of a specific duty under a special act, having no relation to his official duty? Further, where the absolute right of an individual is af-

fected by the performance of the specific duty can he, by merely asserting the immunity of official discretion, be suffered (in the words of Marshall) "to sport away" not only the rights of such individual but also "to sport away" the adjudged basis on which they rest?

IV.

The basis of the respondent's reasons for annulling the auditor's clear statement is adopted by the Court of Appeals as a ground for affirmance of the judgment of the trial court, discharging the rule and dismissing the petition.

The greater part of the opinion of the learned Court of Appeals consists in a statement of the case. After reciting the rule in the Behan case, that court concludes:

"Having prescribed this as the applicable rule, the next direction was to apply it, not to the facts recited in the report, *or to the findings of fact by the Court of Claims*, but to the evidence in the case collected by the United States Court of Claims. What this evidence was as a whole we are not advised. The Secretary says of it in his decision: 'The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters.' His general conclusion from the whole of it is *that it does not show that Parish was ready to deliver and could have made delivery of the whole of the ice if the suspension of the contract had been recalled, and that the payments heretofore made to him exceed the loss which he actually sustained. He was commanded to consider the evidence, to apply the rule of law to it, and to render a decision. This involved the exercise of some discretion, and whether or not he erred in his decision is a matter which the courts have no right to determine. They are vested with no power of review*" (Rec., p. 50).

If such a power was really bes[illegible]ed there can be no doubt that "*this involved the exercise [illegible] some discretion*," since it involved a discretion to nullify a judgment of the court of last resort, rendered in the year 1879.

The measure of damages in the case of a contract which has been broken is "the difference between the cost of doing the work and what he (the injured party) was to receive for it (110 U. S., 345)—*i. e.*, what he would have received if the contract had not been broken. When, therefore, the respondent says (what, in effect, the Court of Appeals adopts): "It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only when a vendee makes default, if the contract is to be construed, as though no default had been made," the quarrel is with the rule. If the rule is not *per se* "idle and misleading" in every case to which it has been, or may be, applied, it is not "idle and misleading" as directed to be applied in the case at bar.

V.

A ministerial duty is one to be performed or exercised in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and irrespective of the judgment of him on whom the duty is imposed as to the propriety of the performance.

A ministerial duty "is a simple definite duty arising under circumstances, *admitted or proved to exist*, and imposed by law" (*State v. Johnson*, 1 Wall., 198).

Even where the office itself is judicial, a special duty may be imposed which is ministerial (*Ex parte Vandee*, 49 Ala., 399).

"It has been argued that the law does not require the court to build such bridge or causeway unless it is necessary, &c.; that this inquiry and decision imply a discretion in the court. * * * But if this doctrine were true to the extent contended for in this case, then there is an end to the remedy by mandamus, *for no case can be imagined where a court, a corporation or an individual can be called upon, on the happening of any event whatever, to perform an act in which the body or person so called upon has not the right to*

inquire whether the event has happened and whether under the circumstances of the case he or it is bound to perform the act."

Commonwealth v. Justices of Fairfax County, 2 Virginia Cases, 9.

The act is none the less ministerial, because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts v. Dimon*, 3 Conn. 107, * * *Hosmer, C. J., in delivering the opinion of the court, said:

"Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

Flournoy v. City, 17 Ind., 174.

A statute of Illinois enacted, that in counties owing debts in excess of revenue, the board of supervisors "*may, if deemed advisable*, levy a special tax, &c."

By the Court: "Great stress is laid by the learned counsel upon the language, 'May if deemed advisable,' which accompanies the grant of power. * * * Whenever the public interest or individual rights call for its exercise, the language used *though permissive in form is in fact peremptory*. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. * * * In all such cases, it is held *that the intent of the legislature, which is the test, was not to invest a mere discretion but to impose a positive and absolute duty.*"

Supervisors v. United States, 4 Wall., 435.

Gordon, as personal representative of Fisher, presented a claim against the Government. It had been before several departments of the Government, and allowances had been made which were not satisfactory. On the 3d of June, 1858, a joint resolution was passed directing the Secretary of War "to proceed *de novo* to execute the act and its supplement

according to their plain and obvious meaning, but to deduct from any amount which might be found *justly and equitably due* to the claimants, all sums which had been previously paid." On the 1st of June, 1860, another joint resolution was passed, directing the Secretary of War to restate and resettle the account, and make "such further allowances, if any, as in his opinion justice to the claimants should require." On the 2d of March, 1861, this resolution was, by another joint resolution, rescinded. The question came before this court, as to the nature of the power, with which the Secretary of War was invested. The answer was:

"The Secretary of War acted *ministerially*. The resolution conferred no judicial power upon him."
Gordon v. United States, 7 Wall., 194.

On a parity with the Gordon case is the case of *Chorpenning v. The United States*. Here it was enacted that the Postmaster General be and he is hereby directed, to adjust and settle the claim of said Chorpenning, as surviving partner of Woodward & Chorpenning in his own right for carrying the mails by San Pedro, and for supplying post-office in Carson's Valley, &c.; and (section 2) required to adjust and settle the claim of said Chorpenning, as surviving partner of Woodward & Chorpenning's contract for carrying, &c. (3 Court of Claims, 144). This court said:

"The duty devolved upon the Postmaster General was wholly ministerial and in no sense judicial" (94 U. S., 399).

A judgment of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, awarded a writ of mandamus to compel the Treasurer of the United States to pay to Mary A. Valentine as assignee a residue of 2-35 per cent. interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to the provisions of section 6 of the act approved June 20, 1874, entitled, "An act," &c. One Evans, who, prior to 1874, had

engaged in laying pavements in Washington city, presented his claims therefor to said board. The board executed two certificates bearing date August 1st, 1874, one of which acknowledged an indebtedness of $19,616.25, and the other $909.40, to Evans. A claim having been set up against Evans for repairs, the board delivered the certificates to the Commissioners of the District, who held them as collateral security for any liability of Evans, until June, 1890. The claim for which they were held afterwards appeared to be not well founded. By reason of the refusal to deliver the certificates, Evans was unable to avail himself of the right under the act of 1874 to exchange the same for the 3.65 bonds mentioned in that act; and also to avail himself of the provisions of section 9 of the act of June 16, 1880, providing for the redemption of the said certificates. An action was brought in the Court of Claims to recover judgment against the District of Columbia upon those certificates.

The first section of an act of August 13, 1894, reads as follows:

"That the Treasurer of the United States is hereby directed to pay to the owners, holders, or assignees of all board of audit certificates redeemed by him under the act approved June 16, 1880, the residue of 2.35 100 per cent. per annum of unpaid legal interest due upon said certificates from their date up to the date of approval of said act providing for their redemption."

The relator, by her attorney, made demand for payments of such balance upon the Treasurer, who refused, giving as reason, in a note to counsel:

"The act referred to provides for additional interest to be paid only upon board of audit certificates redeemed by the Treasurer under the act of June 16, 1880. Neither of the certificates recited in your petition was redeemed by the Treasurer, and they are not in his possession. You state that certain judgments of the Court of Claims were issued in lieu of these certificates. These judgments were paid by this office in the manner prescribed by law, but neither of them

states that they were issued in lieu of or upon debts of the District of Columbia, represented by board of audit certificates. The Treasurer has therefore no authority to pay the additional interest you demand."

(In the case at bar, the learned Court of Appeals, speaking of the act of February 17, 1903, says: "That it is ambiguous is well demonstrated by the radically different views of its meaning taken by the claimant and by the Secretary, whose perfect good faith must be presumed" (Rec., p. 49). But "the radically different views" of the meaning of another act, taken by the claimant and by the Treasurer, "whose perfect good faith must be presumed," did not convince that court, nor this, of ambiguity in the act.)

As to the ground taken in the note to counsel, and the return to the petition, this court, speaking through Mr. Justice Peckham, said:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers

of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon a construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required. In this case we think the proper construction of the statute was clear, and the duty of the treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

Roberts v. United States, 176 U. S., 223, 230, 231.

In the case of *Kendall v. United States*, it is true, the duty of adjusting the accounts of Wm. B. Stokes and others was devolved upon the Solicitor of the Treasury. That officer was "for this purpose to inquire into and determine the equity of the claims of them or any of them, * * * and to make such allowances therefor, as upon a full examination of all the evidence, may seem right, *according to the principles of equity.*" It was enacted "that the said Postmaster General be, and he is hereby, directed to credit such mail contractors with whatever sum or sums of money, *if any*, the said Solicitor shall *so* decide to be due to them for or on account of any such service or contract," &c. The word "*so*" was construed by counsel for the Government to mean "*according to the principles of equity*," in which case only was the Postmaster General to pay. It was, they claimed, clearly the duty of the Solicitor to confine his allowances within the authority conferred on him by the law, and, if so, it was as clearly incumbent on some one, before the credit was given and the money drawn out of the Treasury, to see that the allowances did not extend beyond the law. Who was to do this? In the first instance, at least, the Postmaster General" (12 Pet., 593-4).

The court said:

"The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster had no

discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post-Office Department. * * * There is no room for the exercise of any discretion" (*id.*, 614-615).

"We all agree," said Taney, C. J., "that no discretionary power in relation to the award was given to the Postmaster General; and that the duty enjoined upon him was merely ministerial" (*id.*, 626).

In the Circuit Court of the District of Columbia, Cranch, C. J., said as to the same contention:

"As to the first branch of this argument, we apprehend that the discretion which will justify a party in refusing to do an act must be *a legal right to do or not to do it according to his will.* * * * The Postmaster General seems to admit that, if the law directed the payment of a certain sum, he would have had no discretion; but *id certum est quod certum reddi potest.* * * * The discretion which is claimed by the Postmaster General is no other than that discretion which every man has in regard to his own actions. * * * but he acts at his peril; if correctly, he is justified; if erroneously, he must abide the consequences" (5 Cranch, C. Ct., 238-240).

It is easy to show the correctness of the auditor's statement as to the sums paid for the ice which was delivered by a simple multiplication of the tons delivered at each point by the contract price for ice delivered at that point. "The whole amount of ice which was received by the officers of the Government under said contract, *omitting fractions*," is shown on page 3, the contract price on page 16. Multiplying the former by the latter, we have the following results:

Delivered at St. Louis.....	4,174 tons
Contract price.....	$16 per ton
	25,044
	4,174
	$66,784

Delivered at Cairo	1,388 tons
Contract price	$20
	$27,760
Delivered at Memphis	6,456 tons
Contract price	$20
	$129,120
Delivered at Nashville	750 tons
Contract price	$25
	3,750
	1,500
	$18,750
St. Louis	$66,784.00
Cairo	27,760.00
Nashville	18,750.00
Memphis	129,120.00
Total	$242,414.00
Allowed by Court of Claims	10,444.91
	$252,858.91

$252,858.91
58,341.85 paid under act of February 20, 1886.

$311,200.76

By subtraction of the sums delivered from the sums contracted to be delivered we have the number of tons of undelivered ice as follows:

St. Louis.	Cairo.	Memphis.	Nashville.
5,000	5,000	10,000	10,000
4,174	1,388	6,456	750
826	3,612	3,544	9,250

Multiplying by cost of transportation (Rec., p. 10) we have sum saved on undelivered ice:

St. Louis.	Cairo.	Memphis	Nashville.
826	3,612	3,544	9,250
5	6	8	9
4,130	21,672	28,352	83,250

Nashville	$83,250
Memphis	28,352
Cairo	21,672
St. Louis	4,130
Total	$137,404

The sum found by the auditor as amount saved on undelivered ice is $137,385.12. It will be seen by substraction 137,404—137,385.12 = 18.88, that the sum found by the auditor is $18.88 less than the above computation. Adding the sum found by the auditor to the aggregate of payments we have

$311,200.76
137,385.12
$448,585.88

This is less than the sum found by the auditor, viz:

$448,641.05
448,585.88
55.17

Inasmuch as the number of tons stated in the seventh finding (Rec. p. 3) is stated as the number, "*omitting fractions*," this may account for a difference so small as to be negligible, especially as the Secretary does not animadvert upon any inaccuracy in the auditor's arithmetic. There is no reason to doubt that it is correct to the fraction of a cent. Hence the court can see that the duty imposed upon the Sec-

retary was not only one (in the words of 4 Wallace, 448) "arising under circumstances, admitted or proved to exist, but under circumstances, *admitted and proved to* exist, since the respondent admits that the sum of $181,358.95 "*is the amount conceded to be due, if anything, under the act*" (Rec., p. 37).

VI.

The Test of Sufficiency or Insufficiency of the Return.

"The return to an alternative writ of mandamus is demurrable unless it shows a right to refuse obedience, and it must state the facts which justify such refusal *clearly, specifically, and with such certainty that the court can see at once, that if admitted or established, they furnish a legal alternative for obedience to the writ. The assertion or denial of a legal conclusion without showing the facts which support or forbid such conclusion means nothing; a demurrer to such a pleading must always be sustained. If any pleading misstates the effect of a statute the adverse party in demurring does not admit the correctness of the construction claimed.*"

Woodruff v. R. R. Co., 59 Conn., 65.

"An argumentative denial is no denial" (*id.*, 89).

The language of 59 Conn., 89, may be applied to the so-called denials in the answer: "As denials they are insufficient. Neither of them denies any fact directly." The demurrer does not admit what is not asserted with sufficient certainty, so as to be the basis of judicial action (*Commonwealth v. Armstrong*, 37 Pa. Stat., 289). The facts relied on for justification "should be set out so that the court may judge of their sufficiency" (*Harwood v. Marshall*, 10 Md., 464). The facts, if there be such, to justify the respondent, in respect to the pivotal point submitted, viz., the cost of transportation, are not set out at all in the way of denial of what is alleged in the petition, so that there is nothing before the court upon this subject save what is alleged in the petition.

"The facts relied on to justify the refusal to obey the writ must be clearly and specifically set forth with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as an alternative for obedience to the writ. * * * *Facts, the predicate of conclusions, must be set forth, and not the conclusions merely.*"

Commonwealth v. Armstrong, 37 Pa. St., 279-289.

The reasons for non-compliance returned by the respondent, do not relate to the sole question he was directed to examine, viz., the cost of transportation saved on the undelivered ice, which, in addition to the sums already received, should be deducted from the contract price in order to ascertain the "*balance.*" The reasons relate to matters which were not referred to respondent, and which, by no intendment could have been referred to him. The reasons do not once question the Auditor's arithmetic. It is conceded that if anything is due, the balance found by the Auditor is due. The reasons essay to call in question former adjudications and settlements by this court and Congress; *and by assault upon conclusions which are res judicata between the Government and Parish, to redress what is considered overpayment formerly by non-payment now.*

In the case at bar (as will be more fully shown hereafter), the facts which demonstrate that every prerequisite had been fully complied with for the payment of the balance found due said Parish, and for which the said Act of February 17, 1903, expressly appropriates "sufficient money," are either expressly admitted, or, in consequence of the absence of denial, are by implication admitted.

"A writ of mandamus is not to be answered by a frivolous, evasive, or uncertain return; nor can it be answered by any legal inferences of the defendants from facts not stated. *The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.* * * * The seventeenth averment of the return, in which the defendants allege that they cannot conscientiously levy a tax, because they do not believe that the relators and other hold-

ers of the bonds have any legal claim against the city, certainly has the merit of novelty as a defense. It will hardly be expected that we should spend time upon that."

Strong, J., in *Com. Ex rel. Hamilton v. Council of Pittsburgh*, 34 Pa. St., 496-54.

The ground that claimant has been overpaid by prior judgments in his favor, and that there was no real foundation for such judgments, perhaps "has the merit" of even greater "novelty as a defense."

VII.

The findings of the Court of Claims are like a special verdict, where a jury find the facts of the case, and refer the decision of the cause upon those facts to the court. So far as they go, the findings constitute "the evidence collected in the case in the Court of Claims."

The respondent claims that by the wording of the Act of February 17, 1903, the determination by him, "shall be upon the evidence in said cause, and not upon any findings, of the Court of Claims," which last "are absolutely immaterial to any issue involved herein * * * the said act *"resting in defendant the right to review said evidence, and make such findings as seem right and proper to him"* (Rec., 29). If the respondent had confined himself to the only question submitted to him, viz., "the amount saved by the undelivered ice," he might with some relevancy have termed the findings "immaterial," because on this one point there is no finding. But when he proceeds to retry questions already reduced to judgment, he is not at liberty to ignore findings by which he is concluded, and no power could have been given him to do so. The final judgment thereon precluded such emancipation from these findings. "The judgment having been rendered upon the finding of a referee"—here upon the more authoritative finding of a court—"is conclusive as to the facts

found, in all subsequent controversies between the parties on the contract."

Lumber Co. v. Buchtel, 101 U. S., 638.
Sugdam v. Williamson, 20 How., 432.
Stone v. United States, 164 U. S., 382.
U. S. v. Smith, 94 U. S., 218.
U. S. v. N. Y. Indians, 173 U. S., 470.
Stanley v. Supervisors, 121 U. S., 547.
Runkle v. Burnham, 153 U. S., 225.
Consolidated Canal Co. v. Mesa Canal Co., 177 U. S., 362.

VIII.

The Act of February 17, 1903.

What duties did it lay upon the Secretary of the Treasury?

It directed that

"the Secretary shall determine and ascertain the full amount which should have been paid to Parish & Company if the contract had been carried out in full, without change or default made by either of the parties thereto,"

(*a*) under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of United States *v.* Behan, 110 U. S., 338," and

(*b*) in accordance with the evidence in the case collected by the United States Court of Claims."

So, it was by the application of that "rule of the measure of damages," and upon the "evidence collected by the Court of Claims," that the Secretary was directed to ascertain, "the full amount which should have been paid to Parish & Co. if they carried out in full, without change or default made by either of the parties thereto."

The contract, as construed by the Supreme Court of the United States, in Parish *v.* U. S., 100 U. S., 500, was one

which required Parish to deliver ice, in certain quantities at certain prescribed points, for which the United States was bound to pay him certain fixed prices, as follows, viz.:

At St. Louis, 5,000 tons, at $16 per ton	$80,000
At Cairo, 5,000 tons, at $20 per ton	100,000
At Memphis, 10,000 tons, at $20 per ton	200,000
At Nashville, 10,000 tons, at $25 per ton	250,000
Total amount which should have been for 30,000 tons of ice	$630,000

It appears that the Committee (Rec., p. 21), after reciting the case of Parish *v.* United States, 100 U. S., 500, proceeded to say:

"In the case of the United States *v.* Behan (110 U. S., 338), which was decided four years later than the Parish case, and which is now the rule, the court laid down the rule as follows:

"The *prima facie* measure of damages for the breach of a contract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

And further on the report says:

"The reasons for the application of this more equitable rule in the Behan case were not nearly so clear and strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable."

By the expression "without default or change made *by either of the parties thereto*," Congress could not have intended to leave to the Secretary to ascertain which of the two parties to this contract was in default, because this court had already decided that the United States, and not Parish, was the party in default. In Parish *v.* United States, 100 U. S., 506, this court said:

"And as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

Congress, it must be conceded, then, intended to direct the Secretary to ascertain what amount Parish was entitled to recover, under the condition of the United States, being in default, in the fulfilment of the contract, on its part. Hence it was that the rule of damages laid down in the case of United States *v.* Behan, 110 U. S., 338, was prescribed to the Secretary as the rule that should govern him in the ascertainment of the balance due to Parish, under this contract. The court, in the Behan case, quotes from the opinion of the Court of Claims in that case, as follows:

"Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in default, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration."

The court said:

"We think that these views, as applied to the case in hand, are substantially correct."

And on page 346, it said:

"But, surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damages which the injured party has sustained."

The duty laid upon the Secretary by the act of February 17, 1903, was then to ascertain what amount Parish should receive under the contract which he was ready, able, and willing to carry out, but which he had been prevented from fully carrying out, by the action of the Government in suspending its further execution by the order of the Surgeon-General of March 31, 1863 (Record, p. 3).

The amount and the price of the ice delivered at each of the places specified were fixed in certain quantities.

That Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract, and the terms of the letter of March 25, 1863, but that the Government would not receive it, or more than 12,768 tons of it, are facts found by the Court of Claims.

That the evidence collected by the Court of Claims showed, without contradiction (Record, p. 4), what the cost of the delivery of the lost ice would have been, at the several points specified, appears in the record (Record, p. 10).

These are all the factors that could have possibly entered into the calculation of the amount yet due to Parish.

At no one of the steps or stages of such calculation was any room afforded for the exercise of any discretion, judicial or otherwise, on the part of the Secretary. The whole operation involved no more than a simple arithmetical calculation, and it will hardly be insisted that any mere mathe-

matical calculation, from the adding up of a column of figures to the solution of the most intricate problems in celestial mechanics, can involve the exercise of discretion.

The learned and accomplished Secretary in his finding or conclusion reached in the matter confided to him admits that—

"The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default and did refuse to receive, or at least suspended its order for 30,000 tons of ice" (Record, p. 33).

The Secretary had referred the whole matter to his subordinate official, the Auditor for the War Department, whose business it was, and for a long time had been, to make just such calculations. He was furnished with the act of Congress, and with all the records and papers relating to the subject. He took the evidence collected by the Court of Claims, and applying the rule of damages laid down in the Behan case, he reached a conclusion that there was due to Parish $181,358.95. The Secretary concluded his finding with the statement that—

"Counsel for claimant now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act.* I reach the conclusion that nothing is due."

If the amount ascertained by mathematical calculation is conceded to be correct and to be the amount due to the claimant, if anything is due, the grounds on which the Secretary reached the conclusion that nothing was due should be made clear. This has not been done.

We proceed on the basis that the duty laid on the Secretary did not clothe him with discretionary authority or power. He was not acting here as Secretary of the Treasury in the discharge of any official duty. None of the grave and important functions or duties of his high office were here called into exercise. He was discharging a mere

ministerial duty, which Congress might have laid upon any officer or employee of the Government, as it had frequently done before.

Almost every ground relied on by the Secretary to sustain the conclusion reached by him only serves to disclose the remarkable fact that the Secretary had not been advised of the decision by this court in Parish *v.* United States, 100 U. S., 500, and so had been led to find that many things did not exist, which this court, in that case, had solemnly adjudged did exist.

The Secretary, after stating (p. 34) that "The present controversy is confined to prospective profits on the undelivered ice," states that—

"It is in evidence that *the Government, after making demand upon Parish & Co., under its contract,* actually paid as high as $100 per ton for ice during that summer."

Now, surely, if there had been evidence in this case that the Government had made demand upon Parish & Co., under its contract, this court would not have decided as it did in the Parish case.

He says further—

"I consider it remarkable that Parish & Co. did allow ice purchased at points readily accessible by rail or water to spoil, *while declining to fill orders from the Government,* and in the face of a market value many times the contract price."

Nowhere has it been stated or suggested, far less proven, that the Government gave orders for ice to Parish, or that he had declined to fill them. On the contrary, Finding XI expressly states that after March 25, 1863, no such order was given (Record, p. 4).

He says further (page 35):

"Conceding that when a contract is countermanded the vendor is excused from tendering the subject of the sale, he certainly cannot recover without proof of ability to make de-

livery. * * * The evidence fails to show that at any time after March 25, 1863, Parish & Co. could have delivered the ice from Lake Pepin, had they sought to do so."

In Parish *v.* United States, 100 U. S., 50, this court said:

"As we have already stated, 12,768 tons were delivered and paid for; 10,000 tons perished by melting. What became of the 7,232 tons neither received by the Government nor lost at Lake Pepin is not disclosed by the record, nor whether claimants made by selling it to others or lost by it in that or any other way."

That case was decided in 1879. Parish then applied to Congress for payment, and showed to the committee what had become of the 7,232 tons of ice referred to in the opinion of the court, and on February 20, 1885, Congress enacted:

"That the Secretary of the Treasury be, and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were wholly lost to said Parish" (24 Stat., 653).

This appropriation by Congress in payment for the entire balance of the 30,000 tons of ice contracted to be furnished could not have been made, in the absence of proof that Parish was able to make delivery of the ice, under his contract.

The Secretary further says as to the recovery of profits:

"The claimant invokes the rule laid down in United States *v.* Behan, and that rule declares that profits cannot be recovered when 'incapable of that clear and direct proof which the law requires.' The Secretary of the Treasury is also directed in the act to confine his investigations to the evidence taken before the Court of Claims, and that evidence contains 'no clear and direct proof' as to the profits that might have been made had the ice been delivered."

Now it is manifest that "had the ice been delivered," the claimant would have been entitled to the contract price which covered all the profits to which he could have been entitled. The language of the Behan case, to which the Secretary refers, and from which he partially quotes, is as follows:

"They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires, but when in the language of Chief Justice Nelson in the case of Masterton *v.* Mayor of Brooklyn, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection, they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation' " (United States *v.* Behan, 110 U. S., 344).

But it is evident that the cost of transportation of the ice from Lake Pepin was part of the evidence collected by the Court of Claims. It is set out in paragraph 16 of the petition (Record, p. 10). The specific charge in the petition is not met, but is evaded by the denial of defendant's answer (Record, p. 30). The charge is that "the record of that court shows that the proofs on that point were explicit," and it then recites the proofs. The answer does not deny this, but "denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered under the contract," &c.

But it does not deny that the evidence recited in the petition—the witnesses whose names and testimony are there given—was collected by the Court of Claims and does appear in the record of this case in that court. It could not have denied this. The Auditor of the War Department knew of, and was governed in his findings by this evidence. He could not have reached any conclusion without it. He found the cost of transportation to be $137,385.12.

Congress did not expect the Secretary of the Treasury to make the calculations called for by the act, personally and with his own hand. It was contemplated that he would employ the agencies at his disposal to do this work. He properly laid the burden on the shoulders of the Auditor of the War Department, and that official, guided throughout by the requirements of the act of Congress, did take the evidence collected by the Court of Claims and did apply to it the rule in the Behan case, and did reach the result shown on page 12 of this Record, and when the report of the Auditor was laid before the Secretary he "conceded" that the amount found by the Auditor was correct, but concluded that while that amount was due, if anything was, that nothing was due (Record, p. 37).

The grounds upon which he reached that conclusion are fairly and fully stated above, and it is too plain for dispute that they are not in conflict with the decision of this court in the case of Parish *v.* United States nor the case of United States *v.* Behan, nor in conflict with the facts ascertained by the committee of Congress, upon which it had appropriated the sum of $58,341.85.

IX.

A rule for the measure of damages which directs that in case of breach of contract the injured party shall receive from the defaulting party just what would have been received had there been no default is a perfectly plain rule which has no tendency to mislead anyone, and therefore did not mislead the auditor who stated the account. The rule is not one of novelty. Before the Behan case in this country and in England it had been laid down:

"Here is a clear rule that the amount that would have been received if the contract had been kept is the measure of damages if the contract is broken" (Alder v. Keightly, 15 M. & W., 117; *Hadley v. Boxendale,* 10 Exch., 341; *Benjamin v. Hilliard,* 23 How., 167).

The next excuse for non-compliance is, in effect, a sequel of the previous, viz, that the rule of the Behan case forbids the claimant's conclusion. The rule, it is said, "gives the measure of damages where default has been made. It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only where a vendee makes default, *if the contract is to be construed as though no default had been made.* The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default, and did *refuse to receive,* or at least suspended its order for 30,000 tons of ice" (*id.*). The rule thus criticised gives as the measure of profit "the difference between the cost of work and what he (in this case Parish) was to receive for it" (110 U. S., 345), *i. e.*, what *"should have been paid said J. W. Parish & Co. if the said contract had been carried out in full,"* &c. The imposition of the rule may be tautological, but is not contradictory. It is applicable not upon a "theory," but upon the adjudged fact "that the United States did make default," and did *not* "refuse to receive," but only "suspended" the order for the ice. The rule is a perspicuous one, and the incorporation thereof into the act raises no conflict of direction.

X.

Assertion of unspecified evidence, alleged to exist in contravention of proofs clearly presented in the petition, is assertion having no probative force. Such allegation, when made for the purpose of impairing the effect of existing judgments, would be irrelevant, even if the allegation could be proved and had been proved.

The respondent says (Record, p. 34):

"Parish & Co. claim that a portion of the ice purchased elsewhere than on Lake Pepin went to waste, and they claim prospective profits thereon. The ice purchased elsewhere than on Lake Pepin *was all available for transportation, and*

if it went to waste it was because of neglect. No language in the Behan case, or in any other case, will justify a vendor *in holding the subject of a rescinded sale, in the face of an advantageous market, until wasted or ruined by age, and then prosecuting an action for prospective profits.* I consider it *unthinkable* that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil *while declining to fill orders from the Government, and in the face of a market value many times the contract price.*"

The ample proof produced by Parish was, not that "a portion of the ice," but that all the undelivered ice "went to waste." Therefore the act of Congress of February 20, 1886, directed he should be paid "*the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were wholly lost to said Parish.*"

The language in 100 U. S., 506, is: "As the Government left the demand suspended, so that while claimants were compelled to purchase under the original orders, and *could not safely dispose of it (the ice), while it remained unrevoked, they are entitled to be paid for the ice which was lost.*" &c.

The vendor was justified in holding what was *not "the subject of a rescinded sale."* The order to deliver having been "suspended" only, he was bound by the obligation of contract so to hold it. To this obligation, the Law Board finds that he adhered: "The 8th finding of fact as to meltage and loss of ice at Lake Pepin, together with the declaration, contained in the act of Congress, approved February 20, 1886, that "all the ice not called for was wholly lost to said Parish," are based on sworn testimony" (*id.*, 13). There is no ground for the assertion that Parish ever declined to fill any order from the Government. The direct opposite is found by the Court of Claims, afterwards made binding by the judgment of this court, into which such finding is now merged.

Down to this point it should be plain that the refusal

to take action upon the obvious arithmetical result of the only question submitted is the avowed retrial of a judgment which went to execution in 1886. *The respondent declines to act in respect to what is referred to him, on the ground that former conclusions in respect to matters not referred to him are not "thinkable" by him.*

Finally, it will be seen from the record (No. 158 of October term, 1879) in *Parish v. United States*, 100 U. S., 500, that Thomas Simons, Assistant Attorney General, asked the Court of Claims to make the following additional finding:

"It does not appear that plaintiff made any effort to sell the undelivered 7,232 tons of ice, which had been purchased elsewhere than at Lake Pepin, and the market rates for ice at St. Louis and Chicago, after the 2d of April, 1863, are not shown to have been less than the prices named in the contract."

In the trial court Parish was blamed by the Government because he did not sell this ice; because he was faithful and not faithless to his contract. This was more than "thinkable." *The finding was made as requested.* The attempt to maintain that he obtained two prices for the ice which was lost, by first selling to others and then receiving from the Government reimbursement for the same, is a gratuitous aspersion, which should not have been insinuated by one who "*made a full and complete examination into the claim of Joseph W. Parish against the United States for balance, &c., and into the evidence in the case collected in the Court of Claims*" (Rec., p. 31). In the face of a market value many times the contract price, Parish "kept the faith."

The vendor, says the respondent, "certainly cannot recover without proof of ability to make delivery. For instance, Parish & Co. could not recover even the cost of ice purchased in Alaska to fill a contract subsequently *rescinded* without proving *that it was physically possible to deliver the ice from Alaska.* * * * The proof that they did try and failed is conclusive to my mind that it was impossible to

deliver the ice, and, if impossible, then prospective profits cannot be recovered" (*id.*, 35). The word *"rescinded"* was, of course, inadvertently used. The conclusion stated in the last sentence is derived from an alleged premise shown by the record to have no existence. Nott, J., in his dissenting opinion, said: "That this ice proved a total loss to the contractor, and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial."

12 Ct. of Claims, 622-624.

By a parity of reason, as this court has adjudged that Parish could recover the ice lost at Lake Pepin it has been adjudged "that it was physically possible to deliver it."

XI.

The distinction between profits which admit of "clear and direct proof" and profits which are "remote and speculative in character" in substance is the following: In the former case the gross result of the work under the contract is a sum fixed absolutely, and the cost of the work is able to be fixed (in the case at bar has been fixed) with something like certainty. In the latter case the gross result of the work is speculative, contingent, dependent upon the fluctuation of the market and the chances of business; so that the question of profit depends on a result which is problematical. This is too remote (Coosaw v. Mining Co., 75 F., 865).

When it is known with mathematical certainty what the gross result would be; and (save as to a single item of expense, with a certainty fixed by judgment what the cost of performance is; and the item remaining to be ascertained is established by uncontradicted proof, no element of the "speculative" or "precarious" is present to be considered.

The sixteenth paragraph of the petition gives the testi-

mony of a number of witnesses, among others that of *R. A. Scanlon, Government Superintendent of Transportation at the time,* showing the rates of transportation from Lake Pepin to St. Louis, Cairo, Nashville, and Memphis.

From Lake Pepin to St. Louis.....	$5.00 per ton
From Lake Pepin to Cairo.....	6.00 per ton
From Lake Pepin to Nashville.....	9.00 per ton
From Cairo to Memphis.....	2.00 per ton

The paragraph concludes:

"The foregoing testimony received no word of contradiction from the defendant. The evidence collected by the Court of Claims shows what would have been the price of transporting the non-delivered ice with such certainty that counsel for the Government in that court not only could not disprove, but could not deny it, and in effect admitted what they were unable to disprove. This branch of the claimant's case was therefore conclusively established" (*id.*, 10).

The answer to this paragraph does not deny a word of what is thus stated to be the uncontradicted testimony; does not dispute that it is "uncontradicted testimony."

The direction to be followed would seem to be a simple one. From the whole amount which would have been payable under the contract was to be deducted the whole cost of work. Saving the cost of transportation, the cost of work was known when the act of February 17, 1903, was passed. This cost of work had not been paid because this had not been incurred. After this had been deducted all that was needed to secure the correct deduction of the balance was to deduct the payments theretofore made. No discretion was given to deduct more or less. The following is the result:

Contract price		$630,000.00
Payments by Medical Department	$129,738.33	
Settlements by Second Comptroller	171,072.69	
Award by Court of Claims	10,444.91	
		311,255.93
		$318,744.07
As the cost of transportation had not been deducted in the first instance the auditor deducts it in the end		137,385.12
Leaving the balance due		$181,358.95

The account is stated, the Law Board says, "as if Parish had delivered the whole amount of ice and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice." (Rec., 12.)

XII.

When, as stated by the Law Board, "under the act of February 17, 1903, there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice," all the other deductions directed by the act having been previously determined; so that, "after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition;" nothing is left for the exercise of judicial or other discretion. There is no right of private judgment as to the response to be given to a mathematical proposition.

The respondent does not attempt to dispute the mathematical result reported by the auditor. On the contrary he concedes it. The answer concludes: "Counsel for the claimants now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act. I reach the conclusion*

that nothing was due." (Rec., p. 37.) If anything is due all is due. Parish is entitled to all or nothing. The respondent assumes the burden of showing that nothing is due as the one alternative to the admission that all is due.

If it be said the respondent has decided that by reason of inability to deliver the undelivered ice Parish could not have entitled himself to the contract price thereon, this is the reply.

The answer states that 7,232 tons were "*purchased at points readily accessible*" (Rec., p. 34). Unquestionably these could have been delivered. As to so much, therefore, the respondent cannot be heard to say, "nothing is due." His own answer is his confutation. As to the ice purchased at Lake Pepin, the respondent is concluded by judgment. In 100 U. S., 507, it is adjudged that Parish was entitled to be reimbursed "the cost of the ice purchased at Lake Pepin and lost." Reimbursement was adjudged by this court found due by the War Department and ordered to be made by Congress for ice which could have been delivered, not for ice which could not have been delivered. The determination of the power to deliver was necessary to the determination of the right to be paid. The proof was before this court in finding IX of the Court of Claims—"The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his contract."

In the absence of this decisive evidence the ability to deliver would be implied as an essential ingredient of the judgment which was entered. The proof of the fact is now merged in the judgment of this court and the legislation of Congress in pursuance thereof; in the executed judgments of the Legislative and Judicial Departments. It is no longer in the power of any of the Departments or of all of them together to reopen or revise these determinations in this issue between Parish and the Government.

It is exactly this which the respondent has undertaken to do. He has undertaken to revise and reverse the judgment

of this court and the legislation of Congress pursuant thereto, and after setting aside these judgments of more than twenty years' standing to adjudge (and in the teeth of his own showing as to 7,232 tons) that as the balance of the ice could not have been moved, therefore the balance of the contract price cannot be recovered therefor. He gives as a reason for making no examination on his own part of that which was referred to him that he has laboriously examined that which was not and could not have been referred to him.

As is shown by the supplement or addendum to the Record, filed herewith by stipulation of counsel, the Comptroller of the Currency, to whom the account was referred by the Secretary for re-examination, certifies that he finds "a debit difference of $181,358.95." The exact sum to a cent, found by the Auditor to be due to Parish, the Comptroller finds to be due by him: "the purpose of this certificate being," he states, "to eliminate the balance certified by the Auditor." There is only one possible way by which Parish could be brought in debt to the Government, viz., by previous over-payments to Parish. But the payments theretofore made were payments sanctioned by judgment of this court and legislative enactment in pursuance thereof. Therefore, the judgment of this court, and such legislative enactment, was reversed, first by the Comptroller, and afterwards by the Secretary, in order *"to eliminate the balance certified by the Auditor."*

XIII.

The reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of an act.

In the case of *Kendall v. The United States*, the court fortify their own construction of the act by what is said in a report of the judiciary committee of the Senate (12 Pet., 612).

In *ex parte Farley,* in construing an act making no provision for a grand jury, the court quoted from the report made by Mr. Culberson:

"As the court below is limited in its criminal jurisdiction to offenses below the grade of felony, no grand juries will be needed, and none are provided for."

It is added:

"This is the language of one of the lawmakers; the language of the gentleman, who, as chairman of the Judiciary Committee of the House, had charge of the bill in that branch of the lawmaking power. *The statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent*" (40 F., 69).

"We find, therefore, that the title of the act, the evil to be remedied, the circumstances surrounding the appeal to Congress, *the reports of the committees of each house,* all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor" (Brewer, J., *in Holy Trinity Church v. U. S.*, 143 U. S., 464-5).

In a report by the Senate Committee on Commerce in 1897, the provision was suggested as designed, among other things, "to protect the consumer" (White, J., in *Butterfield v. Stranahan*, 192 U. S., 495).

"The exigencies which led to the passage of the act are graphically set forth in a petition, addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury, and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives."

Brown, J., in *The Delaware*, 161 U. S., 472.

"The act assumes that Hickey owned a tract of land, from which some timber was cut, but does not specify it. It is competent to refer to the report of the committee, which accompanied the bill, with the documents as *prima facie* evidence on this point."

4 Opinions of Attorney General, 479.

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet it is also true that we have examined the reports of committees of either body with a view of determining the scope of statute of such reports," &c.

Binns *v.* United States, 194 U. S., 495.
Johnson *v.* So. Pacific Co., 196 U. S., 19.

As said, in 4 Wall., 435: "The intent of the legislature is the test." If there be a doubt about that intent, what better way to dispel it than by reference to the language used by the committees in reporting the bill? Such being the line of decision from *Kendall v. United States* to the present time, what is to be learned from this source of information?

The title of the act is—

"An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of *any balance found due*" (Rec., p. 17).

The Secretary was not invited to examine, still less to pay what had been already examined and already paid. Standing upon what had been done, as *pro tanto* a finality, he was exclusively directed to ascertain "the balance" which would be left from the contract price, and to pay that.

Turning next to the reports of the two Houses cotemporaneous with and part of the legislative procedure resulting in the act under consideration, we are left in no doubt whatever.

Thus, after stating: "The matter of quantity was quickly settled by the Assistant Surgeon General in the order to the contractors under date of March 25, 1863," it is added: "Thus in twenty days from its date, the contract became definite and determined as to amount, price, places, and time of delivery" (Rec., p. 18). Even if the respondent had been unassisted by the judgment of this court, he might have concluded from the above, the absence of all warrant for his suggestion, that there could be no recovery under the original

contract because that had "been changed by a letter bearing date of March 25, 1863" (*id.*, 33). The committees state: "Parish could not dispose of the ice he had purchased, on the requisition of the Assistant Surgeon General, because the order to purchase 30,000 tons was only *suspended.* * * * The contract terminated, and the balance of the ice melted away, and was a total loss" (*id.*, 19). Irrespective of the judgment of this court, the reading of these reports should have satisfied the respondent he had no warrant for the conclusion: "I consider it unthinkable that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil" (*id.*, 34), and to frame a return on such hypothesis.

Attention to these reports should have satisfied the respondent that he was not emancipated from the conclusions of these "findings"; that in all matters covered by them these findings were "the evidence in the case collected by the United States Court of Claims"; and that especially he could not disregard said finding IX, which is made the basis of the act of February 17, 1903, by holding that this act gave him authority to conclude "that it was impossible to deliver the ice" (*id.*, 35).

The report submits the following proposition:

"Congress having heretofore given *only partial justice* in this case, there is no question but it is authorized to do *complete justice to the claimant, as this bill and the law contemplates*" (*id.*, 22).

This certainly gives no sanction to the view, stated as a ground of action, "that the payments heretofore made to him (Parish) exceed the loss which he actually sustained" (*id.*, 50).

The report states with clearness the rule to be followed. It is, *"that the measure of damages for that part of the contract remaining unperformed at the time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay."*

The report shows why the application of the rule is practicable:

"In the latter case (the Parish case) *the contract expressly provided what should be paid for the ice delivered at the various places named. The profits therefore were readily and easily ascertainable*" (*id.*, 21).

The conviction of the committees which reported the bill is, therefore, utterly at war with the position taken by the respondent, viz., that the profits are "incapable of that clear and direct proof which the law requires" (*id.*, 37).

XIV.

When the object of a writ of mandamus is to invest the plaintiff with an office, there the contention that the action dies with the original claimant is pertinent. But when the action arises ex contractu for the recovery of money; and especially when the right of recovery has been reduced to what might be called legislative judgment or decree, there the action is brought in respect of a property right, and is governed by the rule for the survival of such right and cause of action.

The first reason alleged for non-compliance is that the rights claimed "were mere personal rights of Joseph W. Parish, and were not property which could pass under his will, or to his personal representatives."

The claim and right to recover arises under a contract by Henry Johnson for the United States, and by Joseph W. Parish and William L. Huse "for themselves, their heirs, executors and administrators" (Rec., p. 16). The act of February 17, 1903, was a legislative judgment directing the payment of the money due under this contract. Were the contract less explicit, the implication to the same effect would exist in the contractual obligation.

"The writ of mandamus in such cases as this does not retain its prerogative character, and this is really a civil proceeding to determine the rights of the parties in respect to property."

Miller, J., in *Washington, &c., Co. v. Kansas, &c., Co.*, 5 Dill., 480.

"This court has repeatedly held since Postmaster Kendall's case, 12 Pet., 524, that the proceeding in mandamus is, when appropriate, an action at law to recover money, and is subject to the principles which govern such actions."

Louis v. Brown Township, 100 U. S., 166.

In such a case the writ "becomes a substitute for the ordinary process of execution."

Strong, J., in *Supervisors v. Durant*, 9 Wall., 417.

"Mandamus, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment."

Harshman v. Knox County, 122 U. S., 318.

The right accruing under a statute like the one now before the court may be assigned, and the assignee may be relator in a mandamus proceeding long after the death of the assignor.

Roberts v. The United States, 176 U. S., 231.

In the case last cited, the claimant assigned his right to T. J. Fisher after the death of the claimant, and after Fisher's death the executors of Fisher assigned the claim to one Robinson, and still later he assigned the claim to the relator in the mandamus proceeding. If that relator could sustain the proceeding, it was only because the executors of Fisher could. If the executors of an assignee could sustain the proceeding in that case, surely the executors of the original claimant can in this.

HOLMES CONRAD,
LEIGH ROBINSON,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES EX REL. EMILY E. Parish, executrix of Joseph W. Parish, deceased, plaintiff in error,
v.
GEORGE BRUCE CORTELYOU, SECRETARY of the United States Treasury.

No. 111.

APPELLEE'S BRIEF.

As the court below and counsel for appellant in this mandamus proceeding agree upon the proposition that if the act of Congress of February 17, 1903 (32 Stat., p. 1612), "in its requirements, called for the exercise of judgment and discretion by the Secretary the peremptory writ should not be granted" (brief, p. 22), the present brief might well be confined to the question—

Does the act of 1903 referring this matter to the Secretary of the Treasury require him to use judgment and discretion or merely to make a calculation involving neither?

And perhaps the whole discussion of that question by this brief could be shortened into the question—

Why should a great committee of Congress deem it necessary to recommend the passage of a law re-

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quiring the Secretary of the Treasury to make such a calculation, instead of making that itself or getting some clerk to make it?

However, it may be well to add a few more words, and, first of all, to call attention to the fact that the only relief prayed is that the Secretary be required "to issue a draft to said plaintiff for the sum of $181,358.95, as found due as aforesaid by the auditor," he having "positively refused to pay the balance found by the said auditor."

HISTORICAL AND EXPLANATORY—R. S. 374.

In order to ascertain what Congress meant by the act of February 17, 1903, it is proper to examine the matters mentioned in it and see precisely what was the condition of affairs which the act was passed to enable the Secretary of the Treasury to set right.

What was the "case" in the Court of Claims in which evidence had been "collected?" How far had that case proceeded and why was not the matter finally settled by the Court of Claims or on appeal? What "judgments of court" had been rendered, and what moneys had been paid "in pursuance" of them and of "direct appropriation by Congress?"

What is the rule laid down in the Behan case?

With all these things Congress evidently had some acquaintance, and in the light of them it passed its law for the purpose of having the Secretary make a "full and complete examination into the claim of Joseph W. Parish against the United States for bal-

ance alleged to be due him by virtue of a contract made," etc.

As noted by the lower court referring to the evidence collected, "What this evidence was as a whole we are not advised." Especially is none of the Government's evidence before us. But the record and court reports enable us, except in regard to this evidence as a whole, to put ourselves at the point of view of Congress. The Secretary was not to stop at the findings of fact, but to go to this evidence. The "case" then was a claim for money due under a contract to furnish ice. The "claim" referred to the Secretary was identical with the "case," except that it "alleged" a *balance* of money "to be due by virtue of a contract," etc. That contract was simple and brief (R., p. 16), and bound Parish & Co. to deliver at Memphis, Nashville, St. Louis, and Cairo "the whole amount of ice required to be consumed" at those places during the year 1863, A No. 1 quality. For each ton delivered, inspected, and accepted by the local medical officer in charge they were to get $25 (Nashville), $16 (St. Louis), $20 (Cairo), and $20 (Memphis).

This contract was all, as it had to be, in "writing and signed by the contracting parties with their names at the end thereof." (R. S., 3744; 29 C. Cls. R., p. 264.)

It mentioned no total tonnage of ice and evidently contemplated calls for ice by or on behalf of the local medical officers, who were to receipt bills of lading and certify accounts, on which payments were to be made "from time to time."

No other contract is mentioned in the record, and certainly no altered or different contract was executed validly, i. e., in accordance with our statute of frauds. (R. S., 3744.)

The Court of Claims made no allowance, and an appeal was taken.

This court (100 U. S., 500) did not agree with the Court of Claims in certain respects which are important and to be considered later, and laid down a rule for the measure of damages which was supposed by a committee of Congress to be erroneous or inapplicable to the case and at variance with a later decision in the *Behan case*. (R., pp. 27, 49; 110 U. S., 344.)

In this connection it should be remarked the Senate committee thought the Supreme Court's error clearly arose from "their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it then the court admits that his measure of damages would have been the contract price or the profits he might have made if he had done so," and the Behan case is cited. The Senate committee said this court had overlooked the ninth finding of the Court of Claims. The House committee (R., p. 27) considered the error to have arisen from overlooking this ninth finding of the Court of Claims, that "Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of the letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than 12,768 tons aforesaid."

What that committee complained of is the following passage in this court's opinion (R., p. 27):

> If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver and demanded payment. Had they offered to deliver, and been in condition to deliver, or to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, etc.

What the committee thought the court ought to have applied is the following from the Behan case:

> "The prima facie measure of damages for the breach of contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the

> language of Chief Justice Nelson, in the case of *Masterson* v. *Mayor of Brooklyn* (7 Hill, 69), they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground for recovery in damages they must be proved. If not proved, or if they are of such a remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense."

The committee strangely imagined some overruling of one of these "rules" by the other.

If we turn to the special act we find that, whereas the ninth finding of the Court of Claims seems to imply a default on the part of the Government in not receiving the ice, and the rule in the Behan case expressly applies to a case of breach "in preventing the performance of the contract, without the fault of the other party," the special act directs the Secretary to ascertain, first of all, the full amount which should have been paid "if the said contract had been carried out in full, without change or default made by either of the parties thereto."

What does Congress expect the Secretary to understand by this?

If it had not wiped out and even expressly negatived finding [illegible]nd excluded the theory of any default by either party, we might understand the direction to apply the Behan case. But does Congress desire an arbitrary application of the Behan rule as to *damages* or *losses* by a *breach* where it assumes there has been no breach? If so, how is he to apply this rule?

The rule gives "two distinct items or grounds of damage, namely, what he has already expended toward performance (less the value of materials on hand); secondly, the profits he would realize by performing the whole contract; * * * in order to furnish a ground of recovery in damages they (profits) must be proved."

That is, actual expenditures, less the value of the property bought and not delivered, and profits where they are the direct and immediate fruits of the contract and parcel of it, constitute "the amount of the loss."

If a man contracts to accept 10 carloads of apples at $1,000 a carload, and refuses to receive more than 3 carloads, whereas 6 are bought for delivery at $600 apiece the *damages* are —

Expenditures, the 3 carloads, at $600 apiece, $1,800.

Profits (to be *proven*), 7 carloads, at $1,000, $7,000, less cost and all expenses about them, including freight, say $5,000—that is, $7,000—$5,000=$2,000.

Deduct *value* of the 3 carloads left on hand, say, $700 each, $2,100.

The damages would be, therefore, $1,800+$2,000–$2,100, viz, $1,700.

This is an illustration of applying the rule in the Behan case. If the contract is to be regarded as "carried out in full," the only rule is to pay the price in full.

Furthermore, as the contract called for no total tonnage of ice, the Secretary can not, in the nature of things, ascertain what would have been due "if the said contract had been carried out in full."

TWO COURTS DIFFER AND THE COMMITTEES FIND BOTH WRONG.

The matters about which the Supreme Court differed from the Court of Claims should next be examined.

The Court of Claims held that "the order of Brown," already mentioned, did not bind the Government. It read as follows:

> ASSISTANT SURGEON-GENERAL'S OFFICE,
> *St. Louis, Missouri, March, 25, 1863.*
> Messrs. J. W. PARISH & Co.
>
> GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

	Tons.
At St. Louis	5,000
At Cairo	5,000
At Memphis	10,000
At Nashville	10,000

> making the total of 30,000 which you have contracted to deliver. The ice to be delivered

at *Nashville* and *Memphis* is for use of the sick of the armies in the field and should be furnished without delay.

Very respectfully,

Your obedient servant,

By order of the Assistant Surgeon-General:

JOSEPH B. BROWN,

Surgeon, United States Army.

The Court of Claims said:

> In our judgment, the letter of the Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government, and, as the claimant's case rests upon that, their petition must be dismissed. (12 Court of Claims, p. 620.)

Of course, the letter was no part of the contract, but this court said as matter of law that it was an "unequivocal *demand, under* that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. It required promptitude and diligence in securing the ice." Of course this court was not making findings of fact, which it never does, but applying the law and logic to the contract and demand as quoted in the findings.

Unfortunately for the simplicity of our problem, neither all the ice demanded was delivered or hauled to the place of delivery, or all purchased outright for delivery, instead of being merely contracted for, nor was the demand left "unequivocal" for more than a week (from March 25 to April 2), when it was "suspended." It was never renewed.

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THREE FINAL SETTLEMENTS ALREADY MADE.

In order to show the complete history of the matter it ought to be said that, under the mandate of the Supreme Court, the Court of Claims allowed $10,444.91. The claimant applied to Congress; a committee asked the Surgeon-General for a report, who reported that 17,232 tons had been undelivered and wholly lost to Parish. How or why it was lost the act does not say. This act no more estops the Secretary *than it did this court*, as to losses, failure to tender and inability to deliver. Thereafter a special act directed the Secretary of the Treasury to pay him $58,341.85, being, as the act said, the balance of money laid out in the purchase of the 17,232 tons of ice. The report of the War Department was based upon "evidence taken before the Court of Claims and additional evidence before it," but not now before us nor authorized and directed to be considered by the Secretary.

Payment for the delivered ice, 12,768 tons, and of the $10,444.91, and $58,341 is admitted by claimant.

What he continued to ask for was the "profits" on the undelivered ice of the 30,000 tons. He seems to have thought that the Government having made an "unequivocal demand" for 30,000 tons under the contract, this demand became part of the contract and that no "suspension" could make it anything else or make it equivocal.

Thus far we have been seeking to put ourselves in the position of Congress when it passed the special

act—to see what had happened and the condition of affairs Congress was not quite satisfied about and sought to remedy through the determination and action of the Secretary of the Treasury.

IS THE CONSTRUCTION FAVORABLE TO CLAIMANT INEVITABLE?

Keeping in mind that the public property and rights can not be given away except by unequivocal language of Congress, let us inquire whether the claimant has now become entitled to pay for something not shown to be earned or justly due, but to be *given* through an unequivocal order to the Secretary to make an arbitrary calculation and pay the balance thus found.

"If rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." [a]

We submit that such an arbitrary calculation is not clearly prescribed by any single clause of the act, even taking it apart from all the rest. Let us see.

Take the clause "that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full"

This, at first glance, may look positive and arbitrary; but it does not say which *would* have been paid, but "should" have been, and when we turn to the "contract," an ambiguity immediately arises, because

[a] Leavenworth, Lawrence and Galveston R. R. Co. *v.* U. S. 92 U. S. 733.

the contract "carried out in full" did not call for any particular quantity of ice. When we go beyond the contract in search of certainty as to that quantity, we find ourselves at once where the courts found themselves, that is, confronted with an order under the contract, its sudden suspension, partial deliveries, a contract calling for an "unlimited" quantity of ice and doubts as to the possibility of delivering some of the ice purchased.

This order was not the contract, even before its suspension (29 C. Cls. 264), and the special act nowhere speaks of this order, but only of the contract. And it states the contract as one, not to supply 30,000 tons, but "the whole amount of ice required to be consumed at Memphis," etc.

No other clause of the act seems to be worth quoting as an unambiguous order to make an arbitrary calculation and allowance.

On the other hand, the act in places unequivocally requires something different from an arbitrary calculation.

It unequivocally requires a *full and complete examination* of Parish's *claim* for a balance *alleged* to be due him *by virtue of the contract*. No language could more aptly refer to a special tribunal the adjudication of a claim in the light of the terms of a contract and the law and facts found to be involved. No language could be less apt to express an order to multiply so many tons by specified prices per ton and deduct from the total found the amounts paid and receipted for to the Treasury.

The law equally unequivocally and more than once insists upon the application of the rule as to the measure of damages for *breach* of contract to the facts found by the Secretary to be proven by the evidence "collected" by the Court of Claims.

If to do that properly is not to use judgment and discretion, we should like to know what would be.

He is to conclude "what balance, if any, is *due under the rule and evidence* prescribed herein." And why say "if any," when there would necessarily be one, on appellant's theory of the calculation directed?

It seems to us that the proper carrying out of this special act would require about as much judgment and discretion as the Secretary could muster, and that the task would probably have been entrusted to a court if the committees of Congress had not imagined the Court of Claims and this court unable to master the difficulties.

Certainly we can not in face of all the verbiage it uses understand Congress to mean that the Secretary is to do a sum in arithmetic which any small schoolboy could have done in five minutes, that is, multiply the prices per ton with the 30,000 tons and deduct the amounts already paid as per receipts on file in the Treasury.

Congress or its committee or some clerk could have done that in short order, and quite as well as the Secretary of the Treasury, who could then have been directed to pay the balance found.

But if Congress did mean to order that superfluous figuring, it did not say so in *unequivocal* or any

other language, but used very clear language in conflict with any such supposed intention.

But the claimant, as we understand, has conceded that something more than such a calculation was necessary under the special act, for he has conceded that the arbitrary calculation had to be preceded by somebody's ascertaining "amount saved by undelivered ice."

All he says is that the Secretary is not now the man to go into that, since the auditor has done everything for him.

He is not asking that the Secretary be required to determine "amount saved by undelivered ice," and thereafter make his arbitrary calculation; but he rests his whole case on the extraordinary proposition that all the work directed has been done already and that the Secretary must be ordered to pay what, not he, but the auditor, has found to be the balance by the whole, part discretionary and part arbitrary, performance.

This seems in principle to be a surrender of the whole contention; for two reasons—that the court must deny the only thing prayed for, since the act is not addressed to the auditor, but to the Secretary; and, second, that if part of the problem under the special act requires judgment and discretion, the result is the same as if all parts of the problem required them.

Every court makes mathematical calculations in arriving at its decisions of fact and of law; but it was

never heard that its work was any less adjudicating on that account.

And we do not need anything better than pages 10 and 11 of the claimant's petition as an answer to the proposition that there was no adjudicating to be done.

We may remark in passing that claimant seems to have become enamored of the phrase "prepared and ready to perform," as though that preparation and readiness were equivalent to performance. If the court meant that, it was inconsistent, both in saying what it did about the Lake Pepin ice and perhaps also in dismissing the claim. A man may be prepared and ready to perform without having gone to any expense for purchases, care or freight. He may have merely arranged to purchase or, as one of the Court of Claims findings in this case indicated, may have "contracted to purchase." What he may have lost by contracting to purchase raises a large and obscure inquiry. We refer to the findings only because the appellant insists that they should be referred to—at least, when favorable to him. He has similarly made a selection of favorable items from "the evidence collected."

Having thus given a general history and view of the controversy, let us come down to details.

A VITAL ADMISSIO.

What is it that the Secretary was expected, even as admitted by the claimant, to do under this special act?

Stripped of all confusing language, the claimant's theory is that the Secretary should have determined

from evidence collected by the Court of Claims how much he saved by not having to deliver the ice he claims to have purchased. And stripped of all emphatic statements as to how clear and indisputable that evidence is, that is a business as purely addressed to the judgment and discretion of the Secretary as can be imagined.

The weighing of evidence and drawing conclusions from it are two of the most important and characteristic functions of the judiciary.

But we can easily go beyond what the claimant is forced to admit.

It is not to be supposed that practical men in Congress intended the public moneys to be paid out until there should be a "full and complete examination" of the "claim" and a determination, as a result thereof, that a balance was really and fairly "due" the claimant "by virtue of a contract," as "alleged"—*that allegation being the "claim" itself.*

He is to get his facts from the evidence "collected." He is not told to regard the findings of the Court of Claims or decisions of the Supreme Court, or the act of 1886 allowing the $58,000, partly on evidence said to be on file in the War Department, as so many things adjudicated.

On the contrary, he is to examine the claim *de novo* in spite of the most solemn and authoritative adjudications on matters of fact and law.

The theory of standing by adjudications obviously would be fatal to the appellant's case.

It is because the Supreme Court says the Court of Claims had erred and the committees said this court had blundered that the Secretary is called in to examine the evidence collected and make a full and complete examination in the light of that and of the supposedly new and improved rule of Behan's case for the measure of damages.

From this it follows that he can make up his own mind as to how many tons were actually purchased, paid for, and not delivered.

He might reach a wholly different conclusion from that attributed to the Surgeon-General in 1886, especially as he has not the same evidence before him.

And suppose he finds (as he well may) what the Court of Claims did, that some of the Lake Pepin ice could not have been gotten to its destination, and finds that though it was purchased as alleged and its value calculated and paid for by Congress, yet its delivery was not prevented by the Government, but was prevented by the things mentioned by the Court of Claims, is he blindly to apply the Behan rule about lost profits to this Lake Pepin ice, and if so, how?

Appellant did not, as that rule contemplates, lose these profits because the one party "prevented" delivery "without fault of the other party." The Court of Claims found he was not in a "condition to deliver" the ice because transportation was impossible. (R., p. 4.) That was not the other party's fault, but his misfortune or miscalculation.

Nor is there any room in this case, and especially as to that ice, for the principle that failure to tender is no breach, if the other party clearly shows that acceptance would be declined. For the record indicates, it seems to us, that the Government took about all the ice that was actually offered to it and could be delivered under the contract. Ice in large quantities was taken at all four places—St. Louis, Cairo, Memphis, Nashville. (R., p. 3.) And there is no indication that any ice was declined.

AN OVERLOOKED FINDING.

Light is thrown upon this by the fifth finding of the Court of Claims, giving a letter and telegram of March 31 from the Surgeon-General to the Assistant Surgeon-General at St. Louis, who doubtless showed or explained them to Parish on April 2, when giving him "oral information" about the "suspension" of the order. They read as follows:

SURGEON-GENERAL'S OFFICE,
March 31, 1863.

Parish & Co. have *not* contracted for 30,000 tons of ice. Suspend the order you gave him.

W. A. HAMMOND,
Surgeon-Gen'l.

Col. R. C. WOOD,
Asst. Surgeon-General U. S. Army,
St. Louis.

SURGEON-GENERAL'S OFFICE,
Washington, D. C., March 31, 1863.

SIR: Your communication of the 25th instant to J. W. Parish & Co. in regard to the quantities of ice to be delivered at the different

points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

I am instructed to inform you that the contract with Parish & Co. was made for *such quantities* as might be needed, and that the ice should be ordered from them, *from time to time*, to different points, in lots of *a few hundred tons, as needed.*

Very respectfully,

Your obedient servant,

C. H. ALDEN,

Assistant Surgeon, U. S. A.

Col. R. C. WOOD,

Assistant Surgeon-General, St. Louis, Mo.

Not only does the record indicate that business went along in the matter of purchasing, tendering, and receiving ice under the contract, very much as if no attention, except for purposes of litigation, was ever to be paid to the order or its suspension, but there is another notable thing in the record, viz, the Court of Claims makes the significant finding that claimant "purchased or *contracted for the purchase* of 23,000 tons of ice."

Ice is a peculiar commodity, and all manner of contracts can be made. Without undertaking to guess what the evidence collected by the Court of Claims shows on this point, we suggest that it ought not to be concluded that claimant paid for, received, and lost by melting all the ice he contracted to purchase, except the 12,768 tons he delivered. Besides, it is admitted that even a purchase of 23,000 tons in the far north throws very little light on the quantity

which that would represent in 1863 as ice deliverable at Cairo or St. Louis.

Here is another region into which the Secretary of the Treasury may well proceed in his full and complete examination.

How much of this non-delivered ice was melting ice and how much was dry paper, and of the meltable ice how much would have arrived unmelted at Cairo, etc.?

APPELLANT'S BRIEF.

Probably no case is as often quoted as one relied upon in appellant's brief, page 22, Marbury against Madison, and yet we all know that the only thing decided, after the more or less controversial opinion in that case, was that this court had no jurisdiction to decide about the mandamus, because "the legislature could not give any original jurisdiction in such a case." And this court has since remarked that the case should, as an authority, be confined to the point decided, whereas "in the reasoning of the court in support of this decision some expressions are used which go far beyond it." (*Cohens* v. *Virginia*, 6 Wheat., 399.)

We have no quarrel with *Kendall* v. *U. S.* The head of a department can not control the quasi judicial action of auditors and the like; neither, we may venture to suggest, can he delegate his own quasi judicial functions to any of them.

The rule appellant quotes from *U. S.* v. *Black* (128 U. S., 48) states the law correctly.

It is hardly necessary at this late day to seek his powers in remote analogies about the supervisors of

Otsego, as the law concerning the heads of our executive departments is well settled by direct decisions of this and other federal courts.

We have no quarrel with *Butterworth* v. *Hoe*. The "duty" here was to examine and decide on the appellant's claim and did not need "judicial process to enforce it." The question is whether judicial process is to upset the performance of it.

We have no objection to the proposition that the mere fact that an officer must interpret any law requiring him to perform a plain duty does not convert his duty from ministerial to quasi-judicial.

The latter half of the appellant's brief is ingenious, but is incorrect on page 47 in quoting Finding XI, which merely says that the order of March 25, 1863, remained suspended. Other erroneous statements are noted on pages 3 and 17 about the 12,768 tons; page 5, that this court held Wood's letter to be part of the contract; page 6, in stating alleged "legislation judgment;" page 18, "Congress referred" should be a committee referred.

We do not understand that this case turns on the correctness of the legal arguments of the Secretary of the Treasury in his answer, any more than upon the correctness of his decision on the claim of Parish. Some of his arguments seem to be very good.

CONCLUDING REMARKS.

We understand that the question here, as the case is presented, is, Shall the Secretary be ordered to accept the finding of the auditor as conclusive?

Obviously the special act does not require that he should. That is too plain for argument.

However, supposing a proper case had been presented to raise the other question, Was the Secretary given a mere order to do a thing about which people could not differ or was he ordered to use his judgment? We think the answer is equally obvious.

If the Secretary had been told to carefully examine and adjudicate whether 2 and 2 make 4, and, if so, to pay the claimant so much money, we admit that the nature of things would force the conclusion that Congress intended a mere sum in addition and nothing more. We should incidentally be forced to admit that Congressmen had been guilty of absurdity or a trick.

This court can not but be shocked at the proposition that the Secretary should pay still more money to a claimant who asked $65,000 and has accepted, with temporary gratitude, two or three hundred thousand; to a claimant who relies on people's presuming things in his favor which are by no means satisfactorily proven or probable; who steers an inconsistent course through the findings, the evidence, the principles of res judicata, the authoritative decisions of this court, etc.

What was the real loss of the claimant, not in theories about tenders and res judicata, but in fact?

How much ice did he buy and pay for and actually lose?

Did he not know and know early that the Surgeon-General was "instructed" to and repudiated his assistant's order for 30,000 tons and take measures to prevent loss, as any sensible man would have done?

Did he ignore the difference between ice for Nashville and Memphis, to be delivered "without delay," and ice for Cairo and St. Louis?

Did he not understand and acquiesce in and make a reasonable profit from the supplying of ice as per the letter and telegram of March 31, 1863, to Assistant Wood and the terms of his contract?

That he knew of that letter and telegram on April 2, and thereby knew that the "order" was not temporarily suspended but canceled, appears to us from circumstantial evidence so strong that men have been hanged on weaker. He got "oral information" about the suspension from the man who had just received both the telegram and the letter.

Where is the practical, not theoretical, indication that he really lost the ice he purchased or contracted to purchase?

When we look for proof, we are given language of this court as finding facts, told that an act of Congress has adjudicated, treated to finding 9 of the Court of Claims, which is accompanied by a finding about the impossibility of carrying ice from Lake Pepin. We ask to be shown ice, and we are given words and theories.

This is not so much a question of the independence of the executive branch of the Government and its right as such to be free from interference in performing its functions. It is a question of carrying out a special law of Congress referring a matter expressly and solely to the Secretary of the Treasury, as it might have been referred to anyone else Congress

preferred. The will of Congress is what we are seeking. And certainly every presumption is in favor of the exclusive authority to act of the person selected by Congress to act. It was easy for Congress to refer the same matter to the courts or to give an appeal to the courts. It did neither, and absolutely the only excuse for the courts to meddle would be that the Secretary sat still and would not examine the claim or that he was unequivocally ordered to do a mere sum in addition, multiplication, and subtraction, and would not do that.

As soon as the slightest amount of judgment about facts or law is shown to be involved, the inalienable right of the Secretary to decide the wrong way becomes as clear as that of this court to do the like in cases submitted to it, and this because the maker of the law saw fit to rely upon the judgment of the Secretary.

If Congress has decided what ought to be paid, and merely ordered the Secretary to pay it, the courts can bring in their extraordinary writ to *enforce* the will of Congress against an obstinate man; but if Congress has chosen that the Secretary shall examine evidence and determine from it and a rule of decision whether or not anything is due and ought to be paid, and he does decide that nothing is due, the courts have no right to interfere and thus *thwart* the will of Congress.

Respectfully submitted.

CHARLES W. RUSSELL,
Assistant Attorney-General.

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UNITED STATES *ex rel.* PARISH *v.* MACVEAGH, SECRETARY OF THE TREASURY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 111. Argued March 11, 12, 1909.—Decided May 17, 1909.

If the reference by Congress to the Secretary of the Treasury to ascertain the amount due to a claimant and pay the same requires the exercise of discretion the courts cannot control his decision, *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; but where the statute simply requires him to ascertain the amount, according to certain prescribed rules, the duty is administrative; and, the amount being ascertained according to those rules, the courts can by mandamus compel the Secretary to issue his warrant therefor.

The statute involved in this case, referring the ascertainment of the amount due a claimant to the Secretary of the Treasury, construed on the supposition that Congress regarded the controversy as over and that only the amount remained for ascertainment, as any intricate judicial problem would naturally be referred to the judicial tribunals.

The history of the litigation and legislation in regard to the claim of Parish against the United States for damages on contract for ice made in 1863 for use of armies in the field reviewed and *held* that

under the act of February 17, 1903, c. 559, 32 Stat. 1612, directing the Secretary of the Treasury "to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without charge or default by either party" and to issue his warrant therefor, no judicial duty devolved upon the Secretary, nor has the Secretary power to determine what was right or proper but only the administrative duty of ascertaining the amount and paying the same; and, the amount having been ascertained, the claimant is entitled to a writ of mandamus directing the Secretary to issue his warrant therefor.

30 App. D. C. 45, reversed.

THIS is a writ of error directed to review the judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court dismissing a petition for mandamus to require Leslie M. Shaw, then Secretary of the Treasury, to issue a draft in favor of the petitioner, plaintiff in error here, for the sum of $181,358.95, in payment of a claim referred to him by an act of Congress, approved February 17, 1903. Shaw, pending the appeal, resigned, and Cortelyou, his successor in office, was made a party in his stead, and subsequently Franklin MacVeagh, becoming Secretary, he was substituted for Cortelyou. We shall call plaintiff in error relator and defendant in error respondent, they having occupied that relation in the trial court.

J. W. Parish, of whose estate relator is executrix, entered into a contract with the United States, as J. W. Parish & Company, to deliver, for the use of the United States medical department at Memphis, St. Louis and Cairo the whole amount of ice required to be consumed during the remainder of the year 1863. The quality of the ice was to be "A No. 1," and the contract stated the prices to be paid at the designated points respectively. On March 25, 1863, Joseph B. Brown, by instruction of the Assistant Surgeon General, issued an order directing Parish to deliver the ice as follows: St. Louis 5,000 tons, Cairo 5,000 tons, Memphis 10,000 tons and Nashville 10,000 tons, "making a total," the order recited, "of 30,000 tons which you have contracted to deliver. The ice to

be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay." Parish immediately proceeded to execute the order, and was performing it when, on March 31, 1863, he received a letter from the Assistant Surgeon General, under instructions of the Surgeon General, suspending the order of March 25 until instructions should be received from the Surgeon General. At the date of this letter 12,768 tons of ice had been delivered and paid for at the contract price. The order of suspension was never recalled. Under the authority of an act of Congress, approved May 31, 1872, Parish brought suit against the United States to enforce his demand under the contract. The Court of Claims dismissed the suit. 12 Ct. Cl. 609. This court reversed the judgment and remanded the case, with directions to ascertain the damages sustained by Parish. 100 U. S. 500. The Court of Claims rendered judgment for the claimant for the sum of $10,444.91. 16 Ct. Cl. 642. Parish then petitioned Congress to satisfy as much of his claim as had not been satisfied by the Court of Claims. Responding to a reference by a committee of the House of Representatives, the War Department, through the Surgeon General, reported that the whole of the undelivered ice, through the order of suspension, amounted to 17,232 tons, and the same had been lost by the contractor. The report also stated that under the evidence before the Court of Claims, and additional evidence before the department, Parish was entitled to be reimbursed, in addition to the judgment of the Court of Claims, in the sum of $58,341.85, for the loss he had sustained because of the non-delivery of the 17,232 tons. After this report, on February 20, 1886, Congress passed an act directing payment of said sum of $58,341.85 to Parish, in addition to said sum of $10,444.91, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice for the use and at the request of the Government of the United States, which were not afterwards called for, but were wholly lost to the said Parish. 24 Stat. 653. Parish again

applied to Congress for relief, and, on February 17, 1903, the act in controversy was passed. It will be given in the opinion.

Mr. Holmes Conrad and *Mr. Leigh Robinson* for appellant:

In performing the duty laid upon him by the act of 1903, the Secretary of the Treasury was not acting in the exercise of judicial or discretionary but only of ministerial powers. *Marbury* v. *Madison*, 1 Cranch, 70; *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Black*, 128 U. S. 48; *People* v. *Supervisors of Otsego*, 51 N. Y. 401. Cases cited by the Court of Appeals, viz.: *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *United States* v. *Black*, 128 U. S. 40, and others, reviewed and distinguished.

A ministerial duty is one to be performed or exercised on a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and irrespective of the judgment of him on whom the duty is imposed as to the propriety of the performance. *Commonwealth* v. *Justices of Fairfax County*, 2 Virginia Cases, 9; *Betts* v. *Dimon*, 3 Connecticut, 107; *Flournoy* v. *City*, 17 Indiana, 174; *Supervisors* v. *United States*, 4 Wall. 435; *Kendall* v. *United States*, 12 Pet. 593, 594.

The findings of the Court of Claims are like a special verdict, where a jury find the facts of the case, and refer the decision of the cause upon those facts to the court. So far as they go, the findings constitute "the evidence collected in the case in the Court of Claims." *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Suydam* v. *Williamson*, 20 How. 432; *Stone* v. *United States*, 164 U. S. 382; *United States* v. *Smith*, 94 U. S. 218; *United States* v. *New York Indians*, 173 U. S. 470; *Stanley* v. *Supervisor*, 121 U. S. 547; *Runkle* v. *Burnham*, 153 U. S. 225; *Consolidated Canal Co.* v. *Mesa Canal Co.*, 177 U. S. 302.

A rule for the measure of damages which directs that in case of breach of contract the injured party shall receive from the defaulting party just what would have been received had there been no default is a perfectly plain rule which has no tendency to mislead anyone, and therefore did not mislead

the auditor who stated the account. The rule is not one of novelty. *United States* v. *Behan*, 110 U. S. 338; *Alder* v. *Keightly*, 15 M. & W. 117; *Hadley* v. *Boxendale*, 10 Exch. 341; *Benjamin* v. *Hilliard*, 23 How. 167.

Assertion of unspecified evidence, alleged to exist in contravention of proofs clearly presented in the petition, is assertion having no probative force. Such allegation, when made for the purpose of impairing the effect of existing judgments, would be irrelevant, even if the allegation could be proved and had been proved.

Profits which admit of "clear and direct proof" and profits which are "remote and speculative in character" can be distinguished as follows: In the former case the gross result of the work under the contract is a sum fixed absolutely, and the cost of the work is able to be fixed with something like certainty. In the latter case the gross result is speculative and contingent, depending upon the fluctuation of the market and the ch[illegible]es of business. This is too remote. *Coosaw* v. *Mining Co.*, 75 Fed. Rep. 865.

When it is known with mathematical certainty what the gross result would be there is no speculative or precarious element present to be considered.

When, as stated by the Law Board, "under the act of February 17, 1903, there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice," all the other deductions directed by the act having been previously determined; so that, "after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition;" nothing is left for the exercise of judicial or other discretion. There is no right of private judgment as to the response to be given to a mathematical proposition.

Mr. Assistant Attorney General Russell for appellee:

The act of Congress herein in question was not an un-

equivocal order to the Secretary of the Treasury to make a simple calculation which could have been made in a short time by any accountant, but was a reference to the Secretary of the entire question whether any amount was due to the claimant, and, if so, what amount.

Claimant's theory is that the Secretary should have determined from evidence collected by the Court of Claims how much he saved by not having to deliver the ice he claims to have purchased. And that is a business as purely addressed to the judgment and discretion of the Secretary as can be imagined.

The weighing of evidence and drawing conclusions from it are two of the most important and characteristic functions of the judiciary.

It is not to be supposed that practical men in Congress intended the public moneys to be paid out until there should be a full and complete examination of the claim and a determination, as a result thereof, that a balance was really and fairly due the claimant by virtue of a contract.

He is to get his facts from the evidence "collected." He is not told to regard the findings of the Court of Claims or decisions of the Supreme Court, or the act of 1886 allowing the $58,000, partly on evidence said to be on file in the War Department, as so many things adjudicated.

On the contrary, he is to examine the claim *de novo* in spite of the most solemn and authoritative adjudications on matters of fact and law.

The theory of standing by adjudications obviously would be fatal to the appellant's case.

It is because the Supreme Court says the Court of Claims had erred and the committees said this court had blundered that the Secretary is called in to examine the evidence collected and make a full and complete examination in the light of that and of the supposedly new and improved rule of *Behan's case* for the measure of damages.

From this it follows that he can make up his own mind as to

how many tons were actually purchased, paid for, and not delivered.

He might reach a wholly different conclusion from that attributed to the Surgeon General in 1886, especially as he has not the same evidence before him.

Appellant did not, as that rule contemplates, lose these profits because the one party prevented delivery without fault of the other party. The Court of Claims found he was not in a condition to deliver the ice because transportation was impossible. That was not the other party's fault, but his misfortune or miscalculation.

Nor is there any room in this case, and especially as to that ice, for the principle that failure to tender is no breach, if the other party clearly shows that acceptance would be declined. For the record indicates, it seems to us, that the Government took about all the ice that was actually offered to it and could be delivered under the contract. Ice in large quantities was taken at all four places—St. Louis, Cairo, Memphis, Nashville. And there is no indication that any ice was declined.

We understand that the question here, as the case is presented, is, Shall the Secretary be ordered to accept the finding of the auditor as conclusive?

Obviously the special act does not require that he should. That is too plain for argument.

However, supposing a proper case had been presented to raise the other question, Was the Secretary given a mere order to do a thing about which people could not differ or was he ordered to use his judgment? The answer is equally obvious.

Mr. Justice McKenna, after making the foregoing statement, delivered the opinion of the court.

It will be observed that the controversy in this case started in a contract of no uncertainty of meaning, and an ordinary action for damages for its breach, but has accumulated incidents and complexity, and has finally terminated in a dispute over an ambiguous statute.

The case was submitted in the Supreme Court of the District upon what may be called a demurrer to the return, which was regarded, and is now regarded, as presenting the question of the power of the Secretary of the Treasury under the act of Congress. This is the ultimate question. If that officer had the power, which he asserts in his return, to review the evidence taken in the Court of Claims, and to "make such findings" as might "seem right and proper to him," the judgment of the Court of Appeals must be affirmed. As we may not control the Secretary's discretion (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316), we can have no concern with the reasoning advanced by him to support its exercise.

As we have seen, in the first suit brought by Parish the Court of Claims decided against him. It based its decision on the ground that the Assistant Surgeon General had no "right to interpret the contract and decide that it called for 30,000 tons of ice, and direct how it should be delivered." The court, however, found the facts. It found as follows: "IX. The said Parish was *prepared and willing* [italics ours] to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendant had notice, but they would not, nor did receive more than the 12,768 tons aforesaid." This finding is quoted in the reports of the Congressional committees as one of the elements inducing their recommendation of the passage of the bill.

This court disagreed with the Court of Claims upon the question of the authority of the Assistant Surgeon General, and reversed that court, but decided that the measure of Parish's damages was "the cost of ice purchased at Lake Pepin and lost, the expense bestowed upon its care and the time and expense of making that purchase, and any sum actually lost in regard to the other 17,232 tons of ice purchased to enable them to meet the requirements." This ruling was based on the assumption that Parish "neither delivered nor offered to deliver the remainder."

The Court of Claims, upon the return of the case to it, found obstruction in its rules to taking additional evidence, but on that before it made an award in favor of Parish in the sum of $10,444.91.

He was dissatisfied, and justly dissatisfied. He appealed to Congress, the petition alleges, and respondent does not deny the allegation, for "the means of satisfying so much of his claim as the court of last resort had adjudicated to be his unquestionable right." The petition further alleges (again with no denial by respondent) that his "claim was referred by the House committee to the War Department for report. The Surgeon General found that the whole amount of undelivered ice, viz., 17,232 tons, was lost to said Parish, and ascertained the cost thereof." Congress passed an act February 20, 1886, appropriating the sum of $58,341.85 to pay that loss. 24 Stat. 653-654. By the payment of the money appropriated, Parish received the contract price on the ice actually delivered, namely, 12,768 tons, and, in addition, what he had actually spent and actually lost on account of the balance, namely, 17,232 tons of ice. This is not denied, nor that that which was paid to him was only that which this court had decided should have been paid to him January 1, 1864. "That is to say," to quote from the petition, "the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating the claim, and had been subjected to the labors and anxieties and trials of prosecuting the same."

The next step was the passage of the act in controversy and we come to its consideration and the determination of how its ambiguity, if indeed it have any, is to be resolved. It had, we may say at the start of our discussion, its impulse in the belief that injury had been done to Parish, and it was intended to provide a means of redress. Keeping in view this purpose, we may get light by which to interpret the act.

As we have already said, the ruling of this court in *Parish* v. *United States*, 100 U. S. 500, was based on the assumption that

Parish had "neither delivered nor offered to deliver" the 17,232 tons of ice, the non-acceptance of which has given rise to this controversy. Commenting on that declaration the committees of Congress called it a "mistaken allegation" and a "false assumption," and said that the decision of the court turned upon it. The committees further said that the court "entirely overlooked" finding IX of the Court of Claims, and that the "result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties." The committees then reviewed certain cases, among others *United States* v. *Behan*, 110 U. S. 338, and declared that the latter case established the *prima facie* measure of damages for a breach of a contract sustained by the injured party to consist of "two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract." The report recognized that profits cannot always be recovered, that they may be remote and speculative, incapable of that clear and direct proof which the law requires. But it is manifest that the committees did not think the case called for that limitation, for it was said that the reasons for the application of the "equitable rules in the *Behan case* were not nearly so clear and strong as in the *Parish case*," and declared as follows:

"In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *United States* v. *Behan*.

"In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the *Parish case*. At all events, there is no doubt that the law

is properly stated in the *Behan case*. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our republic, and is everywhere recognized as the only equitable one that can be applied in the premises."

It is manifest, therefore, that the act was passed under the conviction that Parish had rights which had not been satisfied, and we are brought to the consideration of the act as the means of satisfying them.

The act provides "that the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balances alleged to be due him by virtue of a contract made by Joseph W. Parish & Co., with Henry Johnson, medical storekeeper, acting on behalf of the United States. . . . That the Secretary shall determine and ascertain the *full amount which should have been paid said J. W. Parish & Co., if the said contract had been carried out in full without change or default made by either of the parties thereto*, [italics ours] under the ruling of the measure of damages laid down by the Supreme Court of the United States in the case of *United States* v. *Behan*, 110 U. S. 338, and *in accordance with the evidence in the case collected by the United States Court of Claims* [italics ours], and for determining the full amount thus due, . . . under said contract and rule of law aforesaid, to deduct therefrom all payments . . . stating what balance, if any, is due under the ruling and evidence presented herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balances is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated." 32 Stat. 1612, c. 559, February 17, 1903.

The issue between the parties in their ultimate statement is as follows: Relator contends that the Secretary was directed to ascertain what amount Parish should receive under the contract, "which he was ready, able and willing to carry out." Respondent contends that the Secretary was to pass on the

evidence taken in the Court of Claims, and make such finding as might seem right and proper to him. In other words, to exercise judgment and discretion.

To sustain their respective contentions the parties do not urge the same words as the tests of the meaning of the statute. The appellant, to determine the Secretary's duty, puts emphasis on the provision that he was to ascertain the "full amount which should have been paid . . . if the contract had been carried out in full, without change or default made by either of the parties thereto." Respondent finds difficulty with that provision, and says that "at first glance" it "may look positive and arbitrary." But, it is urged that the clause "does not say which *would* have been paid, but which 'should' have been paid, and when we turn to the 'contract' an ambiguity immediately arises, because the contract, 'carried out in full,' did not call for any particular quantity of ice." And to remove the effect of the certainty in the quantity of ice required made by the order for 30,000 tons, it is said that the "special act nowhere speaks of this order, but only of the contract." The final comment is that "no other clause of the act seems to be worth quoting as an unambiguous order to make an arbitrary calculation and allowance," while the act "in places unequivocally requires something different from an arbitrary calculation." To support this it is urged that the act directs a full and complete examination of Parish's claim for a balance alleged to be due him by virtue of the contract. To do this, it is argued, "would require as much judgment and discretion as the Secretary could muster." A striking contrast is exhibited to this by declaring that the duty required of the Secretary under appellant's contention was "to do a sum in arithmetic which any school boy could do in five minutes; that is, multiply the prices per ton with the 30,000 tons and deduct the amount already paid, as per receipts on file in the Treasury."

It is elementary that all the words of the statute must be considered in determining its meaning, and we may not,

therefore, disregard the provision of the statute which directs the Secretary to determine and ascertain the full amount which should have been paid if the said *contract had been carried out in full without change or default made by either of the parties*. And it seems to us that these words express the subject of inquiry, the exact command to the Secretary to which the other provisions of the statute are subordinate. He was not to determine if Parish was in default. That inquiry was precluded. It had been adjudged otherwise by the Court of Claims and by this court. It had been declared otherwise by the legislature. The act of Congress of February 20, 1886, passed to complete the judgments of the courts, appropriated the sum of $58,341.85, "being the balance of money laid out and expended by him (Parish) in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for, but *were wholly lost to said Parish*" (the italics ours).

The following things therefore had been determined: The existence of a contract for the delivery of ice, quantity not mentioned, at different points and at different prices. The quantity was afterwards fixed at 30,000 tons and the contract made specific in every particular, quantity, quality, places of delivery and prices. Performance was undertaken and 12,768 tons delivered. Then came the order of suspension—not revocation, it must be kept in mind, and Parish had to keep prepared. He was not permitted to fulfill his contract, he dared not be unprepared to do so upon any notice. This court in *Parish* v. *United States, supra*, has portrayed the situation. The demand upon him was "an unequivocal demand," the court said, for 30,000 tons, and "to enable him to fulfill this demand . . . required promptitude and diligence in securing the ice." The court states why. A moment's reflection on the situation shows us why. The ice was needed for the use of the armies in the field. It might be demanded at any time. The necessity for it might be imperative. If Parish could not have supplied it, this court said, the officers of the

Government would have procured it at any price in the market, a price which would have been enormously enhanced by that very demand, and Parish would have been liable for the difference between such price and the contract price. He was, therefore, this court said, "under an imperative necessity to prepare to fulfill this requirement." He realized his situation, and that he prepared against its contingencies was the finding of the Court of Claims, it was the declaration of Congress in the act of February 20, 1886, and it was the repeated declaration of the committees of Congress in their recommendation of the passage of the act in controversy. We see now the reason for regarding the opening clause of the act as its principal and dominating clause. We see now why his readiness to perform, the possession of the means of performance and the offer of performance were to be assumed by the Secretary and the loss of profits only was to be determined. And the profits, the committees said, "were readily and easily ascertainable." Indeed, because they were, their calculation was referred to an executive officer. If to ascertain them involved an intricate judicial problem the reference would have been to the judicial tribunals, for we cannot agree with the intimation of the Government that Congress would imagine that the Court of Claims and this court were unable "to master the difficulties" of that problem. The better supposition is that Congress regarded the controversy as over and that the time for reparation had arrived, and, that it might be quick and complete, referred the matter to that officer who could best state the balance due and pay it.

It does not militate with this conclusion that the duty enjoined was simple. The committees of Congress believed it to be so, believed that the extent of relief to which Parish was entitled and the items of it had been established. The act in controversy was the expression of that belief. Its purpose was relief shown to be due from a problem already solved, not to start another problem. The duty enjoined required a reference in a sense to evidence, it may be, but it was to evidence

whose probative force had been estimated and declared. It conduced to but one conclusion. That conclusion was stated by the Auditor of the War Department, following the direction of the statute, to be a balance in Parish's favor of $181,358.95. This amount represented the amount that Parish should have received over and above what he was paid by direct payment, judgment or appropriation by Congress and the balance due him under the rule in the *Behan case*.

The judgment of the Court of Appeals is reversed, and that court is directed to reverse the judgment of the Supreme Court and direct the latter court to sustain the demurrer of relator to the return of respondent and enter judgment as prayed for in petition of relator.

MR. JUSTICE MOODY took no part in the decision.